Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

LLOYD EDWIN HUMPHREYS,

Petitioner,

vs.

STATE BAR, STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the Texas Supreme Court deny access to the Courts, and the right to jury trial provided by Texas Constitutional Mandate, legislative statute, and procedures established by Texas Rules of Disciplinary Procedure, to a member of the state bar convicted of a crime in another jurisdiction in a disciplinary proceeding?

2. Are the Texas Rules of Disciplinary Procedure, adopted from the American Bar Association Model Rules of Professional Conduct unconstitutional, as applied by the Texas Supreme Court, mandating per se disbarment on conviction of a crime without consideration of facts, circumstances, and due process of the "conviction"?

3. Can a state disbar an attorney under rules promulgated in the nature of ex post facto bill of attainder's subsequent to alleged misconduct substantially changing the procedural rights of due process and making more serious the punishment?

4. Is the Amendment of 28 USC 1257 denying right of appeal from state supreme court decisions to the United States Supreme Court for alleged conduct prior thereto unconstitutional as violative of Article I, Section 10, Clause I; Article III, Section II, Clause II; and Amendment 5, United States Constitution?

LIST OF PARTIES

The parties to the proceeding in the Texas Supreme Court whose judgment is sought to be reviewed are the "Commission of the State Bar of Texas", State of Texas, Petitioner-Appellant, consisting of lay person and lawyers, established in 1992, and Lloyd Edwin Humphreys, Attorney, Respondent-Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner-Lloyd E. Humphreys, seeks a Writ of Certiorari to review the judgment of the Texas Supreme Court, entered on June 13, 1994, denying attorney Humphreys Petition For Rehearing and sustaining its earlier judgement ***reversing*** the decision of the Board of Disciplinary Action (BODA) of the Texas Supreme Court dismissing a "Complaint" filed against attorney Lloyd E. Humphreys imposing no discipline based on a conviction in Iowa for tax evasion, by a jury with a statutory disqualified felon and dishonorably discharged juror and automatically disbarring him without consideration of facts, defenses, personal characteristics or procedures,

while admitting such a conviction would be void in Texas.

OPINION BELOW

The opinions of the Board of Disciplinary Action of the Supreme Court of Texas and the Texas Supreme Court are not yet reported, but appear in the Appendix.

JURISDICTION

The Board of Disciplinary Action (BODA) of the Supreme Court of Texas "final judgment" dismissing a Complaint against Petitioner and assessing no discipline was entered on April 22, 1993. The first decision of the Texas Supreme Court was entered January 5, 1994, and a Petition For Rehearing was filed. A second decision was substituted by the Texas Supreme Court on March 30, 1994. Petition For Rehearing was again filed which was denied and judgment was entered for "per se" mandatory disbarment on June 13, 1994, and the Petition For Certiorari relief was filed. The Court's jurisdiction is conferred by 28 USC Section 1257a, amended 1988; but should be of right of appeal under U.S. Constitution, Article 3, Section 2, Clause 2.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article I, Section 10, Clause 1 United States Constitution provides:

"No state shall . . . pass any bill of attainder, or ex post facto law . . . "

2. Article IV, Section 2, Clause 1, United States Constitution provides:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

3. Article three, Section 2, Clause 2, United States Constitution provides:

"In all cases . . . in which a state is a party, the Supreme Court shall have original jurisdiction. In all other cases the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make."

4. Amendment five, United States Constitution provides:

"No person shall . . . nor be deprived of life, liberty, or property without due process of law."

5. Amendment 14, United States Constitution provides:

"No state shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process; nor deny to any person within its jurisdiction the equal protection of the laws".

6. Texas Constitution, Art. I, Section 15, provides:

"Right of trial by jury – the right of trial by jury shall remain inviolate. The legislature shall pass

such laws to regulate the same, and to maintain it's purity and efficiency, . . . "

7. Texas Government Code, Article 81.077 provides:

"The Supreme Court may not adopt or promulgate any rule by abrogating the right of trial by jury of either party to a disbarment action in the county of residence of the accused attorney."

8. Texas Rule of Disciplinary Procedure (Adopted effective May 1, 1992) provides:

"III. District Court Trial De Novo . . . *Rule 3.06 Trial by Jury.* In a disciplinary action, either Respondent or the Commission shall have the right to a jury trial . . . " *Rule 3.07 Trial Setting.* The Court shall set each disciplinary action for trial no later than 180 days after the date the disciplinary petition is filed with the district clerk."

9. Other Statutes and Rules involved in consideration of this case are: (reproduced in Appendix hereto)

28 USC 1257 (prior to 1988 Amendment and after)

Texas Rules of Disciplinary Procedure (effective 5-1-92)

Rule 2.13 Disposition upon finding of just cause (denied to Petitioner)

Rule 2.14 Optional trial de novo (denied to Petitioner)

Rule 2.16 Evidentiary Hearings (denied to Petitioner)

Rule 2.21 Appeals by Complainant, Respondent or Chief Disciplinary Counsel

(denied to Petitioner)

Rule 3.01 Trial De Novo in the District Court (denied to Petitioner)

Rule 3.05 Discovery (denied to Petitioner)

Rule 3.10 Hearing on Sanction; relevant factors (denied to Petitioner)

Rule 3.16 Appeals (denied to Petitioner)

Rule 7.11 Judicial Review

Rule 8 Compulsory Discipline

Rule 9 Reciprocal Discipline (denied to Petitioner)

Texas Bar Diagram of Procedures (denied to Petitioner)

STATEMENT OF THE CASE

On or about May 7, 1992, the State Bar of Texas, filed a disciplinary petition in the District Court of Texas, Travis County, Texas, praying for the disbarment or **suspension** of Petitioner Lloyd E. Humphreys alleging the conviction of a crime involving moral turpitude, for tax evasion prior to **1989**, in a federal court in the State of Iowa. The action was brought based upon the State Bar Act of **1988** and State Bar Rules of **1987**. Attorney Humphreys Answered denying the Petition and demanding jury trial and change of venue to Dallas County, the county of his residence, as provided in Article 10, Section 17, State Bar Rules and Title 2, Article 81.077, Texas

Government Code. The State Bar then dismissed the action on November 20, 1992.

On December 4, 1992, the "**Commission** of the Texas Bar Association," (Commission was created by the Texas Rules of Disciplinary Procedure, adopted by the Texas Supreme Court on May 1, 1992), from the American Bar Association Model Code of Professional Conduct consisting of lay persons and lawyers, filed a "Compulsory Disciplinary Petition" directly with the Texas Supreme Court **Board of Disciplinary Action** (BODA); (BODA was also created by the Rules of May 1, 1992). The petition was based upon the new Rules of May 1, 1992 rather than, the State Bar Act of 1988 and State Bar Rules of 1987.

On January 7, 1993, Petitioner filed a Special Appearance objecting to jurisdiction on the basis that:

A) Submission under the state bar rules of May, 1992, for conduct before 1989 was "tantamount to ex post facto violations of due process and other fundamental rights under the Texas and United States Constitution".

B) That the law and constitution guarantee a right to jury trial and prohibit rules and laws that deny such fundamental rights;

C) That under the facts no crime of "moral turpitude" had been committed and evidentiary hearing was necessary;

D) That the right to venue in the District Court of residence was violated by the petition filed with BODA in Austin, Texas; and that there was generally lack of jurisdiction. That on February 22, 1993, attorney Humphreys

Answered the Complaint, raising the same affirmative defenses and in addition, that the jury verdict was tainted by the presence of a convicted felon, dishonorably discharged, unqualified person on the jury "discrediting any conviction and denying his due process of law under the United States and Texas Constitutions", and submitted an exonerating lie detector test by an independent police officer polygraph examiner confirming his innocence, other evidence of his innocence, and pleading in abatement to continue a scheduled hearing until such time as he could personally appear to defend.

That the hearing before the Texas Supreme Court Board of Disciplinary Action (BODA) went forward in absentia. Humphreys was represented by his lawyer son and other counsel. BODA after hearing and consideration entered a general "Final Judgment" on April 22, 1993, dismissing the Complaint against Humphreys finding no misconduct justifying imposition of discipline under the circumstances.

The Commission appealed the BODA judgment of acquittal without filing objection, motion for new trial, or any point of error before BODA. The sole basis of appeal by the Commission was that conviction for tax evasion was a crime of moral turpitude per se, despite the facts or circumstances in this case, asserting that it mandated disbarment under the **new rules**.

On October 4, 1993, Humphreys filed a Motion To Dismiss in the Texas Supreme Court raising each and all of the grounds raised in his Special Appearance and

Answer before BODA and in addition that the "substantial evidence" rule of limited review prohibited the Commission's appeal, BODA having been granted final authority to "hear and determine" (Rule 7.8) the facts in each case; that the Commission had no authority to appeal (Rule 4.6), that the jury "conviction" was void under Texas law and he was entitled to such "immunity" that he was entitled to a jury trial in disbarment proceedings as provided by legislative mandate, that the former law should, apply not the new rules of May 1, 1992, and the traditional presumptions on appeal favoring the winner below required dismissal of the appeal, all establishing no personal or subject matter jurisdiction in the Texas Supreme Court.

Humphreys also briefed and argued that per se mandatory summary disbarment is directly contrary to fundamental constitutional rights under U.S. and Texas Constitutions, that the "conviction" was void under Texas law due to a disqualified juror and he was entitled to such immunity, and that tax evasion in federal court did not involve the element of fraud and had been held under federal law *not* to be a per se crime of "moral turpitude", and that he was "fit" to practice law.

The Texas Supreme Court entered judgment reversing the Texas Supreme Court Board of Disciplinary Action (BODA) on January 3, 1994, holding that "tax evasion involves moral turpitude per se" pursuant to Texas Rules of Disciplinary Procedure 8.02 (1992) "the record of conviction . . . is conclusive evidence of the attorney's guilt . . . ", and the TRDP (1992) require that attorneys convicted of intentional crimes of moral turpitude be disbarred, "so that BODA was required . . . to

treat the record of conviction as "conclusive evidence" of Humphreys "guilt", and it's "determination" . . . is an abuse of discretion"[1], They also held that "Humphreys is correct that a conviction by a Texas criminal court under the circumstances . . . would be void". They claimed ex post facto and right to jury trial complaints were waived by not having been raised below.

Humphreys Petition For Rehearing, establishing that the ex post facto and right to jury trial were not waived and he had on at least eight (8) predicate occasions objected to the same. He also itemized again the constitutional violations of denial of access to the courts, right of venue, bill of attainder, ex post facto, trial by jury, privileges and immunities, equal protection and due process of law, violation of traditional separation of powers the court ignoring the legislative mandate requiring jury trial in the county of attorneys residence in disbarment proceedings.

On March 30, 1994, the Texas Supreme Court overruled the Petition For Rehearing but substituted the earlier judgment decision and deleted that portion that Humphreys had waived his rights concerning ex post facto application of the law and his right to a jury trial. They now held that "Humphreys prison sentence precludes suspension . . . and Rule 8.05 requires he be

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[1] Iowa suspended, they did not disbar Humphreys. They too, had the "conclusive evidence" rule, but not the mandatory per se disbarment rule; so considered evidence that BODA in Texas relied on to dismiss in mitigation. The "whipsaw" affect of both the "conclusive evidence" and mandatory disbarment rule in Texas and other jurisdictions is what denies *all* due process.

disbarred". They then held, "we reject Humphreys constitutional ex post facto and right to jury trial arguments . . . the application of different procedural rules did not violate Humphreys constitutional rights . . . a jury trial is not statutorily required in mandatory disbarment proceedings, and the constitutional right to a jury is satisfied so long as the disbarred attorney's conviction was obtained in a court of competent jurisdiction by constitutionally adequate procedures".

Humphreys again, petitioned for rehearing. Judgment was entered on June 13, 1994, summarily disbarring Humphreys without jury trial and rejecting consideration of individual facts and circumstances, as prohibited under the new rules.

Prior to 1988 Humphreys could have appealed to the United States Supreme Court for full hearing on the merits but 28 USC 1257 was then amended deleting the right to appeal; that this Petition For Writ of Certiorari is submitted with the objection that such modification materially prejudices the rights Petitioner possessed prior to such amendment.

REASONS FOR GRANTING WRIT

1. The American Bar Association Model Rules of Professional Conduct and ABA Model Code are being adopted in most states, as Texas did in May, 1992, and there is a division among the states as to per se disbarment without consideration of the facts and personal circumstances of the attorney involved which requires

the Supreme Court exercise its supervisory responsibility for uniformity of the administration of justice and due process of law; so that the attorneys of several states have equal protection of the law, and the same privileges and immunities.

2. The application and administration of the disciplinary rules by the decision of the Texas Supreme Court are repugnant to federal law and decisions of this Honorable Court; denying the accused attorney his access to courts, right to jury trial, procedural due process, individual consideration of defenses, individual "fitness" to practice law, the immunity of an admittedly void conviction under Texas law and this holding brings into question the constitutionality of the state supreme court rules in force or about to be in force in most of the states, adopted from the ABA Model Code of Conduct and ABA Model Rules.

3. This case touches the important question accommodating state and federal interest under the Constitution as to the bar association and lawyers that administer justice and due process of law, and States Supreme Courts ruling in favor of their own established rules without further review of the merits.

4. This court is the only arbiter of a direct conflict and dispute of authority between the Texas Supreme Court promulgating and administering rules denying the express right to jury trial in disbarment proceedings contrary to the law of the Texas legislature and other fundamental rights, and the United State Constitution's equal protection and due process of law provisions.

I

The American Bar Association Model Rules of Professional Conduct and ABA Model Code are being adopted in most states, as Texas did in May, 1992, and there is a division among the states as to per se disbarment without consideration of the facts and personal circumstances of the attorney involved which requires the Supreme Court exercise its supervisory responsibility for uniformity of the administration of justice and due process of law; so that the attorneys of several states have equal protection of the law, and the same privileges and immunities.

The American Bar Association Model Rules of Professional Conduct and Model Code are being adopted in many states just as Texas did in May, 1992. But, there is a division of authority in the several state courts in regard to what constitutes an "intentional crime" of "moral turpitude" which triggers the "compulsory discipline" provisions of the rules, and how they interact with other rules.

In Texas, "intentional crime" is defined in the 5/92 new rules as "any *serious crime* that requires proof of knowledge or intent as an essential element." (TRDP 1.06(d) (1992)) "Serious crime" is in turn defined as " . . . any felony involving *moral turpitude* . . . " (TRDP 1.06(u) (1992). The key consideration then in Texas and most jurisdictions is what constitutes "moral turpitude".

Jurisdictions *not* imposing per se "moral turpitude" conclusions in tax evasion cases include: federal – District of Columbia, *In Re Shorter*, 570A 2d 760 (D.C. 1990), *In Re*

McBride, 602 A2d 626 (D.C. 1992), *United States vs. Scharton*, 285 US 518, 552 S.Ct. 416, 76 L.Ed. 917 (1932); California – *In Re Hallinan*, 272 P 2d 768 (1954); Colorado – People ex rel *Dunbar vs. Fisher*, (1955) 287 P 2d 973, Indiana – *Baker vs. Miller*, 138 NE 2d 145, 59 ALR 2d 1393; Kentucky – *Kentucky State Bar vs. Brown*, (1957) 302 SW 2d 834, Louisiana – *Louisiana State Bar vs. Steiner*, (1944) 16 S 2d 843 *Louisiana State Bar vs. Connolly*, (1944) 20 S 2d 168; Maryland – *Rheb vs. Bar Association of Baltimore*, 46 A 2d 289; Minnesota – *Re Diesen*, 217 NW 356; New York – *Application Nassau County Bar Association*, (1957) 163 NYS 2d 752.

These jurisdictions considering tax evasion as a per se crime of moral turpitude include: Oregon, West Virginia, Michigan, Delaware, Ohio, Arkansas, Idaho, Oklahoma, Pennsylvania, Illinois, and Washington. This disparity of treatment among attorneys materially affects the administration of justice and cries out for the Supreme Court to exercise it's supervisory responsibility. The repugnance to federal law and the variance from federal decisions and those of the Supreme Court requires action.

The definition of "moral turpitude" is not the primary consideration here, although it plays a factor. **The important point is that Texas and many of the jurisdictions applying the "per se compulsory disbarment" rule simply look at the formal elements of the alleged crime statute, not the individual facts and circumstances evidenced.** This mass production mechanistic professional decapitation rule denies the fundamental doctrine of individual rights, and professional life and liberty.

In our case, the trial judge in the tax evasion case made a finding that professional conduct was *not* involved. That ground alone could have sustained the BODA Final Judgment of dismissal without prejudice. The Texas Supreme Court and those imposing the per se rule do not consider such a relevant point. After all, it is not whether someone has suffered a conviction for conduct not as an attorney eight (8) or more years ago, but his or her continued professional fitness to practice law which should be the point of inquiry.

In our case, the "conviction" involved tax returns prepared by C.P.A.'s that omitted less than five (5%) percent of Humphreys income. The amounts involved, *less than*, $23,000 over five years did not meet the standard U.S. Department of Justice Guidelines for prosecution. This may have also played a part in BODA's dismissal and Iowa's suspension. This is noted to illustrate personal circumstances differ and the "per se" disbarment rule in conjunction with the "conclusive evidence" rule cuts many a good "fit" attorney's throat; without the due process and equal protection of the law they served.

The profession of law is a "privilege" under the "privileges and immunities" clause; (See *Supreme Court New Hampshire vs. Piper*, (N.H. 1985), 470 US 274, 105 S. Ct. 1272, 84L Ed 2d 205) and it is an occupation important to the national economy. (*Keller vs. State Bar of California*, (1986) 723 P2d 1) It is submitted that the admitted fact by the Texas Supreme Court that the "conviction" of Humphreys would be void in Texas is a classic "immunity" under the same clause; again, that could have sustained the BODA. "Final Judgment" under normal appellate

consideration. Article IV, Section 2, U.S. Constitution specifically secures such privileges and immunities to individuals who move from one state to another. Humphreys and other attorneys similarly situated deserve individual case consideration and the law requires it.

II

The application and administration of the disciplinary rules by the decision of the Texas Supreme Court is repugnant to federal law and decisions of this Honorable Court; denying the accused attorney his access to courts, right to jury trial, procedural due process, individual consideration of defenses, individual "fitness" to practice law and the immunity of an admittedly void conviction under Texas law and this holding brings into question the constitutionality of the state supreme court rules in force or about to be in force in most of the states, adopted from the ABA Model Code of Professional Conduct and ABA Model Rules.

Texas Government Code Section 81.077 (9187) expressly provides:

"The Supreme Court may not adopt or promulgate any rule by abrogating the right of trial by jury of either party to a disbarment action in the county of residence of the accused attorney."

The new "compulsory disbarment" rules adopted from the American Bar Association Model Professional Code, and promulgated by the Texas Supreme Court do precisely what is forbidden! The Texas Supreme Court application of those rules in this case deny attorney Humphreys his right to due process, its privileges and immunities, and equal protection of the law.

Humphreys is the first and only lawyer in Texas to be denied the right to a jury trial in the venue of the county of his residence! But, the decision of the Texas Court and the application of the "per se" rule of mandatory disbarment without consideration of the individual's personal character and circumstances, the facts which are the basis of the conviction, and the refusal to consider traditional defenses in evaluation of a "conviction" from another jurisdiction – due process, infirmity of proof, grave injustice, and that which does not constitute misconduct in this state, will lead to the disbarment of like **Nelson Mendela, Solomon Roushdie, Moses, The Apostle Paul**, all alleged to have committed intentional crimes of moral turpitude, in other jurisdictions.

The former rules as interpreted required filing in the Texas District Court as was originally done in this case. But there are also a number of rights and procedures Humphreys was denied which he should have been entitled to under either the disciplinary rules prior to May 1, 1992, or of after. A diagram of the normal processing of a complaint published by the bar association clearly illustrates a multitude of due process procedures to which Humphreys was entitled but denied, (Appendix) The entire local bar investigation hearing and decision process was cutoff by the "Commission of the State Bar", filing directly with BODA. Both the "Commission" and "BODA" did not exist under the former law. The entire local district court process including discovery, presentation of defenses, and mitigating circumstances was denied. The right to jury trial in the county of residence was cut off. The opportunity of appeal to the Texas Court of Appeals was denied.

This Texas decision dehumanizes the accused lawyer. It trivializes the disciplinary process denying the most fundamental considerations of justice and fair play!

The Texas Supreme Court specifically found that, "Humphreys is correct that a conviction by a Texas criminal court under the circumstances would be void". Yet, it denied that Texas immunity to him. Although, in Texas such a void conviction would not "constitute professional misconduct". (See *Tweedle vs. State*, 218 SW 2d 886 (Texas 1946).

BODA could well have based their decision on that fact alone which under a general verdict of dismissal would under normal due process require affirmation by the court; not reversal. **Going from a BODA decision of no misconduct requiring no discipline to per se mandatory disbarment illustrates the gross failure of due process and equal protection of the law in this case.**

The "requirements of procedural due process must be met before a State can exclude a person from practicing law." *Willner vs. Committee on Character*, 373 US 96, 102. "Therefore, one of the conditions this court considers in determining whether disbarment by a state should be followed by disbarment here is whether the state procedure from want of notice or opportunity to be heard was wanting due process." *In Re Ruffalo*, 390 US 544, 550.

The Texas decision applying the ABA model code rules as adopted in Texas is too narrow. The ABA code as adopted by Texas would allow something more than the per se disbarment without defense, mitigation, or individual consideration when as in this case, the purported

"conviction" is in a different jurisdiction. TRDP 9.04 provides for several defenses evaluating individual cases due process and justice all of which apply in this case and any one of which the BODA decision dismissing without discipline could have been based requiring affirmation not reversal. This was ignored by the Texas court.

The Texas decision and the other jurisdictions with the per se compulsory disbarment rule are interpreting and applying the ABA model rules so rigidly that they isolate the "compulsory discipline Part VIII" rules as standing alone, not subject to the due process requirement of "Part IX Reciprocal Discipline" or the fundamental rights of "Part III trial de Novo in the District Court".

Attorneys putatively subject to "compulsory discipline" are being treated disparately from all other attorneys and denied basic fundamental rights by the per se mandatory disbarment rules under the application and construction of the Texas decision in this case, and others similarly situated.

III

This case touches the important question accommodating state and federal interest under the Constitution as to the bar association and lawyers that administer justice and due process of law, and States Supreme Courts ruling in favor of their own established rules without further review of the merits.

The seeds of the Holocaust are nurtured and grow in the darkness of political motivations touching the administration of justice. Texas Supreme Court Judges are

elected. The McCarthyism like attitude sweeping American politics as to who can be tougher on "law and order" issues can jaundice judicial decisions when "candidates" act as judges. The light of day in proper judicial scrutiny is called for by the appellate process to avoid due process and fundamental rights being set aside by the bias, or prejudice of state supreme court decisions not subject to appeal on the merits.

In the fifties the south was accused of segregationist political views that colored some of their state court decisions. If the appeal rights of 28 USC 1257 and the U.S. Constitution had not been there as a shield from "states rights" where would we be today?

The amendment of 28 USC 1257 to take away appellate review of state supreme court decisions elevates them and their bias and prejudices to a degree which may not be detected in the limited review provided by certiorari.

It is submitted that Senator Hruska's committee recommendation of a national court of appeals for state supreme court decisions would be a better method of reducing case loads at the supreme court level rather than, striking the long established constitutional right of federal appeal of state supreme court decisions. (See 67 F.R.D. 220; Freud, "Why we need a national Court of Appeals" 59 A.B.A.J. 247, (1973). **Cases in which state supreme courts are upholding their own promulgations, and application of rules such as here, should be especially suspect and subject to review.** (*C.F.*, Siegel, "Commentary" following 1988 Revision, 28 USC 1257).

The bifurcation, or isolation, of "per se compulsory discipline" rules from other provisions of the rules is a perversion of their substance and procedure, that does not allow for proper scrutiny of due process, defenses, and mitigation, casting individual liberties into the foundry of mass professional murder.

Bar association disciplinary proceedings have been termed by the court to be, "adversary proceedings of a quasi-criminal nature." (*In Re Ruffalo*, 390 US 544, 551, see also, *Resolution Trust Corporation vs. Bright*, (CA 5 TX 1993) 6 F2d 336; *In Re Medrano*, (CA 5 TX 1992), 956 F2d 101). Under those circumstances the constitutional prohibitions as to ex post facto-bill of attainder should apply to require not only the processing and charging of an alleged lawyers misconduct under the law existing at the time it occurred but also the judicial rights of trial, appeal, and review.

A "bill of attainder" is legislative action, (or court construction) which inflicts punishment without judicial trial, including the taking of life or liberty. (See e.g. *Cummings vs. Missouri*, (1868) 71 US 277) Statutory construction which is unexpected and indefensible by reference to the prior law creates prohibited ex post facto law. (See *U.S. vs. Martino*, (CA FLA 1981) 648 F2d 367, recons. 654 F 2d 651, cert. den. 456 US 943, rehrg 648 F 2d 36).

"Liberty" means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. (See *Smith vs. Texas*, (1914) 23US 630, 34 S.Ct. 681, 58 L.Ed. 1129), (*Allgeyer vs. LA*, (1897) 165 US 589, 17 S.Ct. 427, 41 L.Ed 832).

Due process precluded retroactive application of law that creates substantive rights (See *Florida vs. Scherer* (FLA 1990), 558 S 2d 411, *Clay vs. Lynaugh,* (Texas CA 5) 846 F 2d 8 (Ex post facto application of Texas court).

In our case, the promulgation of the May 1992 rule by the state court changing the filing, processing and hearing of complaints and the court's application of them in this decision by isolating the "compulsory discipline" rules from other provisions thus disallowing individual considerations of defenses, or mitigation and limiting the punishment which mechanically automatically applies decapitating a lawyer professionally without any due process is a bill of attainder-ex post facto action that should be prohibited.

The removal of the right of appeal in this case, in which the alleged misconduct arose between 1983-85, 1988-89, by the amendment of 28 USC 1257 is in the nature of an ex post facto bill of attainder, and also in derogation of Article 3, Section 2, Clause 2 of the United States Constitution.

The double effects of both state and federal rights being wiped out particularly prejudices our case and affects the consideration of other states disciplinary decisions over attorneys similarly situated.

The "per se disbarment rule" denies all of the individual fundamental rights that make America what it has been. It is a giant step toward denial of rights. If it can be done to an attorney, it can be done to anyone!

IV

This court is the only arbiter of a direct conflict and dispute of authority between the Texas Supreme Court promulgating and administering rules denying the express right to jury trial in disbarment proceedings contrary to the law of the Texas legislature and other fundamental rights, and the United States Constitution's equal protection and due process of law provisions.

The Texas Supreme Court's interpretation of the disciplinary rules it adopted from the ABA model code and rules is directly opposing the legislature's mandate:

Texas Government Code, Article 81.077 provides:

> "The Supreme Court may not adopt or promulgate any rule by abrogating the right of trial by jury of either party to a disbarment action in the county of residence of the accused attorney".

Texas Constitution, Art. I, Section 15, provides:

> "Right of trial by jury – the right of trial by jury shall remain inviolate. The legislature shall pass such laws to regulate the same, and to maintain it's purity and efficiency, . . . "

The Texas Constitution provides for a separation of powers similar to that of the United States Constitution granting to the legislature the power to make laws. (Texas Constitution, Article 2, Section 1; *Gross vs. State*, (Texas 1958) 308 SW 2d 54. *Joslin vs. State of Texas*, (1986) 722 SW 2d 725, 761 SW 2d 376) When the legislature acts it is binding on the courts, (See *Castillo vs. Canales* (Texas 1943) 174 SW 2d 251).

The equal protection clause of the United States Constitution directs that "all persons similarly circumstanced shall be treated alike."(*F.S. Royster Guano vs. Virginia*, (1920) 253 US 412, 415.

The equal protection clause of the U.S. Constitution and the separation of powers the Texas Constitution mean that the Texas court has no authority to promulgate rules in conflict with statute. (See e.g. *Magnolia Petroleum vs. Long*, (Texas 1935) 86 SW 2d 450; *Ex Parte Howard*, (Texas 1986), 711 SW 2d 652). This has also been construed to restrict the Texas court from ascribing to words a distorted meaning at variance with that ascribed by the legislature or the average citizen. (*Williams vs. State*, (Texas 1985) 698 SW 2d 266 affirmed 725 SW 2d 258; *Wolf vs. Young*, (Texas 1955), 277 SW 2d 744).

Attorneys convicted of a crime are being treated disparately from others. The "compulsory discipline" ABA rules adopted are being lifted out of context in this decision and construed to deny directly rights guaranteed to all. The Texas Supreme Court decision denies equal protection of the law! It encroaches on the separation of powers.

Our case is further compounded by the defenses of TRDP 9.04 applying to cases from other jurisdictions being denied to attorney Humphreys. Further denial of equal protection and due process! This shocking injustice should be corrected and others similiarly situated in the several states should be protected.

CONCLUSION

For these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

No. 00766

STATE BAR OF TEXAS	)	BEFORE THE
V.	)	BOARD OF
	)	DISCIPLINARY
LLOYD E. HUMPHREYS	)	APPEALS

FINAL JUDGMENT

On February 27, 1993, came on to be heard the Petition for Compulsory Discipline filed by the State Bar of Texas against **Respondent Lloyd E. Humphreys**. Assistant General Counsel Mary Klapperich appeared for the Chief Disciplinary Counsel on behalf of the Commission for Lawyer Discipline. Respondent appeared by his attorneys Lowell Jones and Charles Humphreys. After reviewing the pleadings and hearing the argument of counsel, a majority of the Board of Disciplinary Appeals finds that no discipline shall be imposed in this proceeding (Mary Alice McLarty, William J. Rice, Cheryl Wattley, and Gaines West concurring; Chairman Thomas H. Watkins, Eduardo Rodriguez, and Steven J. Watkins dissenting; Faye M. Bracey abstaining; Tom Wells not voting).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petition for Compulsory Discipline be dismissed, and that no discipline be imposed upon **Respondent Lloyd E. Humphreys** in this proceeding.

All relief not expressly granted is denied.

SIGNED this 22nd day of April, 1993.

_____

Thomas H. Watkins, Chairman

APPENDIX 2

IN THE SUPREME COURT OF TEXAS

No. D-3811

IN THE MATTER OF LLOYD E. HUMPHREYS

Argued December 1, 1993

On Appeal From The Board Of Disciplinary Appeals
Of The State Bar of Texas

JUSTICE CORNYN delivered the opinion of the Court, joined by CHEIF [sic] JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE GAMMAGE, JUSTICE ENOCH and JUSTICE SPECTOR.

JUSTICE DOGGETT concurs in the judgment only.

This is an appeal form [sic] a decision of the State Bar of Texas Board of Disciplinary Appeals ("BODA") dismissing a Disciplinary Action by the State Bar Office of Chief Disciplinary Counsel ("OCDC") seeking to disbar Lloyd Humphreys. Humphreys has been convicted of tax evasion in federal court, and the principal question we decide is whether this is an Intentional Crime involving moral turpitude. We hold that tax evasion is such a crime, and that the Texas Rules of Disciplinary Procedure compel Humphreys' disbarment.

I

Following a jury trial in the United States District Court for the Northern District of Iowa, Lloyd Humphreys was convicted of the felony offense of willful attempt to evade or defeat a tax, 26 U.S.C. Section 7201, for the tax years of 1983, 1984, 1988, and 1989. The jury also found Humphreys guilty of the misdemeanor offense of willful filing of a false tax return. On November 22, 1991, the district court sentenced him to prison for three concurrent terms of six, twelve, and eighteen months, respectively, and to a subsequent three-year term of probation. The United States Court of Appeals for the Eighth Circuit has affirmed the conviction and the sentence.

TEXAS R. DISCIPLINARY P. 8.01 (1992) *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon Supp. 1994) provides:

> When an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation . . . with or without an adjudication of guilt, the Chief Disciplinary Counsel *shall* initiate a Disciplinary Action seeking compulsory discipline pursuant to this part. (emphasis added)

Following this mandate, the OCDC commenced a Disciplinary Action against Humphreys.

TEXAS R. DISCIPLINARY P. 8.02 (1992) states:

> In any Disciplinary Action brought under this part, the record of conviction or order of deferred adjudication is *conclusive evidence* of the attorney's guilt. (emphasis added)

TEXAS R. DISCIPLINARY P. 8.05 (1992) requires that attorneys convicted of Intentional Crimes be disbarred:

> When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime, *the attorney shall be disbarred* unless the Board of Disciplinary Appeals, under section 8.06[1] suspends his or her license to practice law. (emphasis added)

Nevertheless, BODA dismissed the State Bar's petition against Humphreys on April 22, 1993, following a February 27 hearing. The OCDC requested that BODA provide written findings of fact and conclusions of law, but BODA declined. Pursuant to TEX. R. Disciplinary P. 7.11 (1992), the OCDC appealed BODA's decision directly to this court.

The State Bar argues that BODA had no power to dismiss the Disciplinary Action, and that BODA is required to disbar Humphreys. Humphreys responds with several arguments: (1) that this court is without jurisdiction to hear the State Bar's appeal, (2) that BODA is not required to recognize the record of conviction because the procedures applied in the federal trial would have been defective had they been subject to review

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[1] Humphreys prison sentence precludes Rule 8.06 suspension. Rule 8.06 requires suspension of an attorneys's license only if "an attorney's sentence upon conviction of a Serious Crime is *fully probated*, or if an attorney receives probation through *deferred adjudication* in connection with a Serious Crime." Humphreys meets neither of these two conditions, and therefore Rule 8.05 requires that he be disbarred.

under the Texas Code of Criminal Procedure, and (3) that tax evasion is not an "Intentional Crime involving moral turpitude," and therefore he should not be disbarred.

II

A

In his jurisdictional challenge, Humphreys first argues that the State Bar Commission for Layer [sic] Discipline is without authority under TEX. R. DISCIPLINARY P. 4.06 (1992) to direct the OCDC to pursue an appeal from a BODA decision. To the contrary, the Commission has authority to exercise "all rights characteristically reposed in a client by the common law of this state," including the right to appeal, TEX. R. DISCIPLINARY P. 4.06(A) (1992), and therefore the State Bar has authority to appeal adverse BODA rulings to this court. TEX. R. DISCIPLINARY P. 7.11 (1992). On the same ground, we reject Humphreys's contention that the State Bar is not a "real party in interest."

Humphreys argues that TEX. R. DISCIPLINARY P. 7.08 (1992) gives BODA "final" authority over proceedings before it. We disagree. BODA has authority to "hear and determine" Disciplinary Actions, TEX. R. DISCIPLINARY P. 7.11 (1992).

Nor is this action time-barred by the TEX. R. DISCIPLINARY P. 15.08 (1992) LIMITATIONS PERIOD. Rule 15.08 APPLIES TO "ALLEGATIONS[s] of Professional Misconduct . . . *except* in cases in which disbarment or suspension is compulsory." (emphasis added) We also

hold on the basis of the record before us that the State Bar timely filed its notice of appeal.

We also decline to dismiss this appeal for want of a statement of jurisdiction. *See* TEX. R. APP. P. 131(d). Because this appeal "resembles that taken from a trial court to the court of appeals," similar procedures apply, and Rule 131(d) is not applicable. *See State Bar v. Humphreys*, 36 Tex. Sup. Ct. J. 1055 (June 23, 1993) (per curiam).

Finally, Humphreys argues that this court may not review the legal conclusions of BODA because an appeal under TEX. R. DISCIPLINARY P. 7.11 (1992) is subject to "substantial evidence" review. This argument fails because questions of law are always subject to *de novo* review. Although the Administrative Procedure and Texas Register Act ("APTRA"), 73RD lEG., r.s., CH. 268, Section 1, 1993 Tex. Sess. Law Serv. 587 (Vernon) (to be codified as TEX. GOV'T CODE ANN. Section 2001.001 – 2001.902), technically, does not govern BODA procedures, *see Minnick v. State Bar*, 790 S.W.2d 87 (Tex. App. – Austin 1990, writ denied), the APTRA sections governing appeals from administrative proceedings are analogous and therefore instructive. *Board of Law Exam. v. Stevens*, S.W.2d ___. ___ (1994). APTRA Section 2001.174(2) provides:

> If the law authorizes review of a decision . . . under the substantial evidence rule . . . a court . . . shall reverse or remand the case for further proceedings if . . . the administrative findings, inferences, conclusions, or decisions are: . . . (D) affected by other error of law . . .

Thus, even under the substantial evidence test, we review the legal conclusions of BODA *de novo*. We also disagree

with Humphreys's assertion that the State Bar has waived this point by failing to raise a special "point of error, or appeal point that is directed at that limited standard of review." No party need raise a point of error directing this court to the appropriate standard of review under Rule 7.11.[2]

B

Humphreys claims that he should not be disbarred because his federal criminal conviction was tainted by legal error. Specifically, he alleges that one of the jurors serving on the federal panel that convicted Humphreys was not qualified to serve as a juror because of a criminal conviction. Humphreys is correct that a conviction by a Texas criminal court under the circumstances he alleges would be void. TEX. CODE CRIM. PROC. ANN. art. 35.19 (Vernon 1989); *Tweedle v. State*, 218 S.W.2d 846 (Tex. Crim. App. 1949). But Humphreys was not convicted in a Texas court, and we think it sufficient answer to point out the obvious: Texas criminal procedure does not govern federal criminal trials in Iowa.

BODA was required, under TEX. R. DISCIPLINARY P. 8.02 (1992), to treat the record of conviction as "conclusive evidence" of Humphreys's guilt. Moreover, U.S. CONST. art. 4, Section 1, and 28 U.S.C. Section 1738, require Texas to extend "full faith and credit" to the judgements of federal trial courts in other states just as

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[2] We do not reach Humphreys's constitutional Ex Post Facto and jury trial arguments because he failed to preserve error by raising these issues below.

Texas must to the decisions of other state courts. *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645 (1900). Inasmuch as Humphreys's conviction has been found to meet federal procedural standards, it necessarily satisfies the requirements of the Texas Rules of Disciplinary Procedure.

III

A

Humphreys further argues that his extensive record of community service, his heretofore unblemished record of professional conduct, and the circumstances surrounding his conviction all militate in favor of leniency.[3] The

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[3] Closely paraphrased, Mr. Humphreys's brief states:
Lloyd Edwin Humphreys, age 55, has been a lawyer since the age of 23. He graduated from the University of Iowa College of Law Cum Laude and was part of the law review staff. Humphreys was the first person in thirty years to attend law school and play college football. His honors include three Big Ten Championships, two Rose Bowls, three letters, and All Star recognition. He was president of all his graduating classes in college and school. He was the youngest Chairman of the State Bar Committee and editor of the Federal Practice and Procedure Handbook for the Iowa Bar. He was elected to the Iowa Academy of Trial Lawyers which selects its 225 members by membership vote. He has received many civic awards for distinguished service. He also served his country as the first defense counsel in Vietnam, having volunteered in 1965 as a regular Army officer. He has been approved by his church as a candidate for ministry and has completed several courses in seminary.

Humphreys was never disciplined by a state bar in over thirty years of practice.

In 1984, shortly after he was interviewed to run for Congress, the federal prosecutor and the I.R.S. began investigating

compulsory discipline rules, however, do not distinguish among convicted attorneys except by the nature of their crimes. Collateral matters, such as an attorney's record of service and achievement, or bad acts and character traits not related to the record of conviction, are not at issue.[4]

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him. In February, 1987, twelve armed agents raided Humphreys & Associates Law Firm, P.C., where Humphreys and other attorneys offices, with a search warrant. The warrant was issued by a Magistrate who was hired shortly thereafter by his former law firm. The senior partner in this firm was married to Humphreys's ex-wife. [Humphreys alleges the warrant was issued improperly and the search exceeded the scope of the warrant.]

In August 1990, within days of the statute of limitations expiring, the federal prosecutor in Iowa indicted Humphreys for tax evasion in 1983, 1984, and 1985. This was for less than five percent of his gross income and involved tax returns all prepared by a certified professional accountant who had also been his accountant-bookkeeper with an office within the law firm. The I.R.S. Special Agent later testified Humphreys's books of account were "surprisingly accurate."

The Department of Justice Guidelines for Prosecution required at least three consecutive years of tax deficiencies of at least $2,500.00 per year. In order to qualify, the I.R.S. moved income from 1984 to 1985, and included property pledged under security agreements as "barter income" from 1983. It also intentionally misrepresented at least one income item.***

[4] *See also Supreme Court Comm. on Professional Conduct v. Jones*, 509 S.W.2d 294 (Ark. 1974) ("Another premise upon which much testimony is based is hat [sic] the conviction was politically motivated. For the purposes of this proceeding we must, and do, accept the jury verdict at face value."); *In re Mann*, 154 S.E.2d 860, 863 (W. Va. 1967) ("That question, we believe, must be determined from the crime itself, rather that upon the basis of facts and circumstances affecting personally the [attorney] who stands convicted."); *In re Tinkoff*, 101 F.2d 341 (7th Cir. 1938), *cert denied*, 308 U.S. 553 (1939) ("Respondents answer . . . consisted of allegations of fact, which if true, established that

Under TEX. R. DISCIPLINARY P. 8.04 (9192) [sic], compulsory discipline for an Intentional Crime turns solely on the validity of the record of conviction, the nature of the sentence, and the factual determination that the Respondent is the same person as the party adjudicated guilty. All attorneys convicted of Intentional Crimes, as defined in TEX. R. DISCIPLINARY P. 1.06 (1992), are subject to mandatory discipline.

B

TEX. R. DISCIPLINARY P. 1.06(O) (1992) defines "Intentional Crime" in relevant part as "any Serious Crime that requires proof of knowledge or intent as an essential element." A conviction under 26 U.S.C. Section 7201 requires the government to prove that the defendant has "willfully attempt[ed] . . . to evade or defeat a tax" beyond a reasonable doubt. "Willfulness" in this context means voluntary intentional violation of a known duty. *United States v. Daniels*, 617 F2d 146, 148-49 (5th Cir. 1980); *United States v. King*, 616 F2d 1034, 1039 (8th Cir. 1979). Thus, a conviction under 26 U.S.C. Section 7201 necessarily satisfies the *mens rea* requirement of the definition of Intentional Crime. However, we must still determine

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his conviction in the criminal case had been obtained as a result of perjury committed with the knowledge and consent of the [prosecutor' . . . The District Court properly refused to retry the original criminal case for the purpose of showing that the judgment of that case was wrong . . . That judgment was an adjudication of the fact that respondent had committed the acts in which law constituted the charged felony . . . and is not subject to collateral attack in a disbarment proceeding . . . ").

whether a willful attempt to evade or defeat a tax is a "Serious Crime" under the Texas Disciplinary Rules.

> "Serious Crime," as defined in TEX. R. DISCIPLINARY P. 1.06 (U) (1992),
>
> means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Willful attempt to evade of defeat a tax is a felony punishable by a fine not more than $100,00 [sic] or imprisonment not longer than five years. 26 U.S.C. Section 7201.

We have held that the question of whether a particular crime involves moral turpitude is a question of law and "is to be determined by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law." *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmt. 4 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. A (Vernon Supp. 1994) (STATE BAR RULES art. X, Section 9). Although the comments to the former AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1981), indicated that jurisdictions were split on the question of whether "offenses against the revenue laws" involve moral turpitude, *see* MODEL CODE DR 1-102(A)(2) n.13, the more recent AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 8.4 cmt. 1 (1992), specifically lists revenue offenses among those that "reflect

adversely on fitness to practice law" in its discussion of moral turpitude:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.[5] However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

Tax evasion is not a matter solely concerning "personal morality." Willful attempt to evade or defeat a tax involves intentional conduct, in violation of a known legal duty and in pursuit of personal gain, that effectively defrauds the government and other taxpayers. *Daniels; King; Garber, supra.* As such, it is an offense involving deliberate greed and dishonesty and has a specific connection to a lawyer's fitness to practice.

The overwhelming majority of jurisdictions considering this issue have determined that willful attempt to

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[5] This specific example of attorney misconduct involving the revenue laws is a misdemeanor, as opposed to the felony of willful attempt to evade or defeat a tax. *See* 26 U.S.C. Section 7203.

evade or defeat a tax is a crime involving moral turpitude. *In re Taylor,* 851 P2d 1138 (Or. 1993); *Committee on Legal Ethics the State Bar vs. Boettner,* 422 S.E.2d 478 (W.Va. 1992); *Attorney Grievance Comm'n v. Osburn,* 498 A.2d 276 (Md 1985) (disbarred for state tax violations); *In re Wines,* 660 P.2d 254 (Ariz 1983) (defendant charged with violating 26 U.S.C. Section 7201 and convicted of lesser-included Section 7203 offense following plea bargain suspended for misdemeanor involving "moral turpitude."); *State Bar Ass's [sic] v. O'Halloran,* 412 So.2d 523 (La. 1982); *In re Grimes,* 326 N.W. 2d 380 (Mich. 1982) (suspension raised to disbarment); *In re Readron,* 369 A.2d 666, 667 (Del. 1976); *State Bar Ass'n vs. Agnew,* 318 A.2d 811 (Md 1974) (Attorney disbarred despite record of service:"[W]hen a member of the bar is shown to be willfully dishonest for personal gain by means of fraud, deceit, cheating or like conduct . . . disbarment follow[s] as a matter of course."); *Dayton Bar Ass'n v. Carter,* 319 N.E.2d 358 (Ohio 1974) (per curiam); *Supreme Court Comm. on Professional Conduct v. Jones,* 509 S.W.2d 294, 295 (Ark. 1974) (("[W]e reject all contentions that one's guilt of willfully and knowingly attempting to evade or defeat payment of taxes . . . does not involve moral turpitude."); *In re Snook,* 499 P2d 1260 (Idaho 1972); *In re Abramson,* 37 A.D.2d 301, 324 N.Y.S.2d 891 (N.Y. App. Div. 1971); *In re Bosch,* 175 N.W.2d 12 (N.D. 1970); *In re Mann,* 154 S.E.2d 860 (W.Va. 1967); *State ex. rel. Okla. Bar Ass'n v. Houts,* 420 P.2d 498 (Okla. 1966); *In re Foley,* 364 S.W.2d 1 (mo. 1963) (en banc); *In re Alker,* 157 A.2d 749 (pa. 1960); *State v. Brodson,* 103 N.W.2d 912, 195 (Wis. 1960); *In re Teitelbaum,* 150 N.E.2d 873 (Ill. 1958); *State ex rel. The Florida Bar v. Evans,* 94 So. 2d 730 (Fla. 1957); *In re Seijas,* 318 P.2d 961

(Was 1957). Three other jurisdictions have held that such a violation frequently involves moral turpitude, but does not involve moral turpitude *per se*. *In re Shorter*, 570 A.2d 760 (D.C. 1990) (disbarred); *In re Gibbs*, 271 N.E.2d 729 (Ind. 1971) (disbarred); *In re Hamilton*, 272 P.2d 768 (Cal. 1954), *later proceeding, In re Hallinan*, 307 P.2d 1 (Cal. 1957) (per curiam). No court has held, as Mr. Humphreys asks us to do, that willful attempt to evade or defeat a tax as a matter of law does not involve moral turpitude.

The weight of reason and authority lead us to the conclusion that a violation of 26 U.S.C. Section 7201 involves moral turpitude *per se*. The non-*per se* cases uniformly distinguish crimes that involve moral turpitude from those that do not on the basis of vague tests not specifically related to an attorney's fitness to continue in the practice of law. For example, Humphreys cites *In re Hallinan*, 272 P.2d 768; *In re Shorter*, 570 A.2d 760, and *In re McBride*, 602 A.2d 626 (D.C. 1992) for the proposition:

> [A] crime involves moral turpitude if "the act denounced offends the generally accepted moral code of mankind." It involves "baseness, vileness, depravity in the private and social duties which man owes to his fellow man or to society in general . . . "

See Shorter, 570 A2d at 765; *Hallinan*, 272 P.2d at 771. These cases also base their conclusions that tax evasion does not involve moral turpitude *per se* on the argument that "intent to defraud" is not an essential element of tax evasion.

Modern authorities defining moral turpitude have abandoned vague standards such as "the generally accepted moral code of mankind." *See, e.g.* AMERICAN

BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 8.04 cmt. 1. Instead, we have said that crimes involving moral turpitude are "to be [identified] by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law." *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980). Generally, moral turpitude is implicated b [sic] crimes that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* ABA MODEL RULES 8.4(b), (c). By definition, a violation of 26 U.S.C. Section 7201 "involve[s] intentional dishonesty for purposes of personal gain." *See In re Hallinan*, 307 P.2d at 2. It therefore involves moral turpitude *per se*. Accordingly, we hold that felony tax evasion is an Intentional Crime for disciplinary purposes.

The Board of Disciplinary Appeals determination that felony tax evasion is not an Intentional Crime is erroneous as a matter of law, and is therefore an abuse of discretion. Accordingly, we reverse the order of the Board, and hereby render judgment disbarring Lloyd Humphreys.

John Cornyn
Justice

OPINION DELIVERED: January 5, 1994

APPENDIX 3

IN THE SUPREME COURT OF TEXAS

No. D-3811

IN THE MATTER OF LLOYD E. HUMPHREYS

Argued December 1, 1993

ON APPEAL FROM THE BOARD OF
DISCIPLINARY APPEALS OF
THE STATE BAR OF TEXAS

JUSTICE CORNYN delivered the opinion of the Court, joined by CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE GAMMAGE, JUSTICE ENOCH and JUSTICE SPECTOR.

JUSTICE DOGGETT concurs in the judgment only.

Petitioner's motion for rehearing is overruled. We withdraw our opinion of January 5, 1994, and substitute the following opinion.

This is an appeal from a decision of the State Bar of Texas Board of Disciplinary Appeals ("BODA") dismissing a Disciplinary Action by the State Bar Office of Chief Disciplinary Counsel ("OCDC") seeking to disbar Lloyd Humphreys. Humphreys has been convicted of tax evasion in federal court, and the principal question we decide is whether this is an Intentional Crime involving moral turpitude. We hold that tax evasion is such a crime,

and that the Texas Rules of Disciplinary Procedure compel Humphreys's disbarment.

I

Following a jury trial in the United States District Court for the Northern District of Iowa, Lloyd Humphreys was convicted of the felony offense of willful attempt to evade or defeat a tax, 26 U.S.C. § 7201, for the tax years 1983, 1984, 1988, and 1989. The jury also found Humphreys guilty of the misdemeanor offense of willful filing of a false tax return. On November 22, 1991, the district court sentenced him to prison for three concurrent terms of six, twelve, and eighteen months, respectively, and to a subsequent three-year term of probation. The United States Court of Appeals for the Eighth Circuit has affirmed the conviction and sentence.

TEXAS R. DISCIPLINARY P. 8.01 (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (Vernon Supp. 1994) provides:

> When an attorney licensed to practice law in Texas has been convicted of an International Crime or has been placed on probation . . . with or without an adjudication of guilt, the Chief Disciplinary Counsel *shall* initiate a Disciplinary Action seeking compulsory discipline pursuant to this part.

(Emphasis added). Following this mandate, the OCDC commenced a Disciplinary Action against Humphreys. TEXAS R. DISCIPLINARY P. 8.02 (1992) states:

> In any Disciplinary Action brought under this part, the record of conviction or order of

> deferred adjudication is *conclusive evidence* of the attorney's guilt.

(Emphasis added). TEXAS R. DISCIPLINARY P. 8.05 (1992) requires that attorneys convicted of Intentional Crimes be disbarred:

> When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime, *the attorney shall be disbarred* unless the Board of Disciplinary Appeals, under section 8.06,[1] suspends his or her license to practice law.

(Emphasis added). Nevertheless, BODA dismissed the State Bar's petition against Humphreys on April 22, 1993, following a February 27 hearing. The OCDC requested that BODA provide written findings of fact and conclusions of law, but BODA declined. Pursuant to TEX. R. DISCIPLINARY P. 7.11 (1992), the OCDC appeal BODA's decision directly to this court.

The State Bar argues that BODA had no power to dismiss the Disciplinary Action, and that BODA is required to disbar Humphreys. Humphreys responds with several arguments: (1) that this court is without jurisdiction to hear the State Bar's appeal, (2) that BODA

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[1] Humphreys's prison sentence precludes Rule 8.06 suspension. Rule 8.06 requires suspension of an attorney's license only if "an attorney's sentence upon conviction of a Serious Crime is *fully probated*, or if an attorney receives probation through *deferred adjudication* in connection with a Serious Crime." Humphreys meets neither of these two conditions, and therefore Rule 8.05 requires that he be disbarred.

is not required to recognize the record of conviction because the procedures applied in the federal trial would have been defective had they been subject to review under the Texas Code of Criminal Procedure, and (3) that tax evasion is not an "Intentional Crime involving moral turpitude," and therefore he should not be disbarred.

II

A

In his jurisdictional challenge, Humphreys first argues that the State Bar Commission for Lawyer Discipline is without authority under TEX. R. DISCIPLINARY P. 4.06 (1992) to direct the OCDC to pursue an appeal from a BODA decision. To the contrary, the Commission has authority to exercise "all rights characteristically reposed in a client by the common law of this state," including the right to appeal, TEX. R. DISCIPLINARY P. 4.06(A) (1992), and therefore the State Bar has authority to appeal adverse BODA rulings to this court. TEX. R. DISCIPLINARY P. 7.11 (1992). On the same ground, we reject Humphreys's contention that the State Bar is not a "real party in interest."

Humphreys argues that TEX. R. DISCIPLINARY P. 7.08 (1992) gives BODA "final" authority over proceedings before it. We disagree. BODA has authority to "hear and determine" Disciplinary Actions, TEX. R. DISCIPLINARY P. 7.08(D) (1992), subject to review by this court. TEX. R. DISCIPLINARY P. 7.11 (1992).

Nor is this action time-barred by the TEX. R. DISCIPLINARY P. 15.08 (1992) limitations period. Rule 15.08 applies to "allegation[s] of Professional Misconduct . . . *except* in

cases in which disbarment or suspension is compulsory." (emphasis added) We also hold on the basis of the record before us that the State Bar timely filed its notice of appeal.

We also decline to dismiss this appeal for want of a statement of jurisdiction. *See* TEX. R. APP. P. 131(d). Because this appeal "resembles that taken from a trial court to the court of appeals," similar procedures apply, and Rule 131(d) is not applicable. *See State Bar v. Humphreys*, 36 Tex. Sup. Ct. J. 1055 (June 23, 1993) (per curiam order).

Finally, Humphreys argues that this court may not review the legal conclusions of BODA because an appeal under TEX. R. DISCIPLINARY P. 7.11 (1992) is subject to "substantial evidence" review. This argument fails because questions of law are always subject to *de novo* review. Although the Administrative Procedure Act ("APA"), 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Sess. Law Serv. 587 (Vernon) (to be codified as TEX. GOV'T CODE ANN. §§ 2001.001-2001.902) (formerly Administrative Procedure and Texas Register Act), technically, does not govern BODA procedures, *see Minnick v. State Bar*, 790 S.W.2d 87 (Tex. App. – Austin 1990, writ denied), the APA sections governing appeals from administrative proceedings are analogous and therefore instructive. *Board of Law Exam. v. Stevens*, 868 S.W.2d 773, 777 (1994). APA § 2001.174(2) provides:

> If the law authorizes review of a decision . . . under the substantial evidence rule . . . a court . . . shall reverse or remand the case for further proceedings if . . . the administrative

> findings, inferences, conclusions, or decisions are: . . . (D) affected by other error of law. . . .

Thus, even under the substantial evidence test, we review the legal conclusions of BODA *de novo*. We also disagree with Humphreys's assertion that the State Bar has waived this point by failing to raise a special "point of error, or appeal point that is directed at that limited standard of review." No party need raise a point of error directing this court to the appropriate standard of review under Rule 7.11.

We reject Humphreys's constitutional Ex Post Facto and jury trial arguments. The Ex Post Facto Clause, U.S. CONST. art. I, § 9, prohibits laws that criminalize behavior retroactively. *Collins v. Youngblood*, 497 U.S. 37, 41-43 (1990); *see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-56 (1984) (explaining the term "Bill of Attainder"). Humphreys's only complaint concerns retroactive application of the disciplinary procedure rules. He does not suggest that BODA has subjected him to criminal punishment or even that the substantive standards for compulsory discipline have changed. BODA's application of different procedural rules did not violate Humphreys's constitutional rights. The right to trial by jury, *see* U.S. CONST. art. III, § 2, amend. VI, amend. VII (none of which apply to Texas attorney discipline actions); TEX. CONST., art. 1, § 15 (granting legislature power to "pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency"), is maintained by statute for original disbarment actions "in the accused attorney's county of residence." TEX. GOV'T CODE § 81.077(A) (Vernon Supp. 1994). However, a jury trial is not statutorily required in

mandatory disbarment proceedings, TEX. GOV'T CODE §§ 81.078(b), (c), (d) (Vernon 1988), and the constitutional right to a jury is satisfied so long as the disbarred attorney's conviction was obtained in a court of competent jurisdiction by constitutionally adequate procedures.

B

Humphreys claims that he should not be disbarred because his federal criminal conviction was tainted by legal error. Specifically, he alleges that one of the jurors serving on the federal panel that convicted Humphreys was not qualified to serve as a juror because of a criminal conviction. Humphreys is correct that a conviction by a Texas criminal court under the circumstances he alleges would be void. TEX. CODE CRIM. PROC. ANN. art. 35.19 (Vernon 1989); *Tweedle v. State*, 218 S.W.2d 846 (Tex. Crim. App. 1949). But Humphreys was not convicted in a Texas court, and we think it sufficient answer to point out the obvious: Texas criminal procedure does not govern federal criminal trials in Iowa.

BODA was required, under TEX. R. DISCIPLINARY P. 8.02 (1992), to treat the record of conviction as "conclusive evidence" of Humphreys's guilt. Moreover, U.S. CONST. art. 4, § 1, and 28 U.S.C. § 1738, require Texas to extend "full faith and credit" to the judgments of federal trial courts in other states just as Texas must to the decisions of other state courts. *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645 (1900); *see generally Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 794 (Tex. 1992) (holding that Texas is required to extend full faith and credit to valid judgments from other states). While Texas will not

extend full faith and credit to judgments or orders that violate Fourteenth Amendment due process rights, *see Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 23 (1907), Humpheys's [sic] conviction involves no due process violation. The Fourteenth Amendment of the United States Constitution[2] guarantees Humphreys those rights "so rooted in the tradition and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968); *Rochin v. California*, 342 U.S. 165, 169 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For example, persons accused of "a capital, or otherwise infamous" crime are entitled to indictment by a grand jury in a federal prosecution, but the Fourteenth Amendment does not require this procedure at the state level. *Alexander v. Louisiana*, 405 U.S. 625, 633-34 (1972). Likewise,

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[2] Humphreys also suggests that Texas should not recognize a conviction obtained with the participation of an unqualified juror because such a conviction violates the Jury Trial Clause, TEX. CONST. art. I, § 15, and the Due Course of Law Clause of the Texas Constitution. TEX. CONST. art. 1, § 19. While the Jury Trial Clause employs different terms than the Seventh Amendment of the United States Constitution, *compare* TEX. CONST. art. 1, § 15 ("The right of trial by jury shall *remain inviolate.*") *with* U.S.CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall *be preserved*") (emphasis added), the right Humphreys asserts has a statutory foundation. TEX. CODE CRIM. PROC. ANN. art. 35.19 (Vernon 1989); *Tweedle v. State*, 218 S.W.2d 846 (Tex. Crim. App. 1949). Moreover, the Texas Constitution is irrelevant in this context. The Full Faith and Credit Clause of the United States Constitution, U.S. CONST. art. IV, § 1, at "the supreme Law of the Land," U.S. CONST. art. VI, cl. 2, is controlling.

the Seventh Amendment right to a jury trial does not apply to the states. *Alexander v. Virginia*, 413 U.S. 836, 836-37 (1973). Inasmuch as Humphreys's conviction has been found to meet federal procedural standards, it necessarily satisfies the requirements of the Texas Rules of Disciplinary Procedure.[3]

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[3] Humphreys argues that we have inconsistently extended full faith and credit to the judgment of the federal court in Iowa, and yet refused to follow *In re Shorter*, 570 A.2d 760 (D.C. 1990), which he claims is a decision by a "federal court," in deciding whether tax evasion is a crime of moral turpitude. He also suggests that a finding in the record of conviction that Humphreys was not acting as an attorney when he evaded his taxes precludes compulsory discipline.

In arguing that we should treat the case law of other jurisdictions as binding on the issue of whether tax evasion is an Intentional Crime, Humphreys apparently challenges our choice of law. *See generally Bradford Elec. Light Co. v. Clapper*, 284 U.S. 221, 222-23 (1931); *Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 500-05 (1939). He does not explain why the law of the District of Columbia and not Texas law should determine licensure issues involving members of the State Bar of Texas. We note in passing that the District of Columbia Court of Appeals, a state court created under U.S. CONST. art. I, § 8, cl. 17, is not an Article III federal court. In response to the second alleged inconsistency, the compulsory discipline rules apply to any attorney "convicted of an Intentional Crime," TEX. R. DISCIPLINARY P. 8.01, 8.03, 8.04, whether the attorney was acting as an attorney or not.

III

A

Humphreys further argues that his extensive record of community service, his heretofore unblemished record of professional conduct, and the circumstances surrounding his conviction all militate in favor of leniency.[4] The

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[4] Closely paraphrased, Humphreys's brief states:

Lloyd Edwin Humphreys, age 55, has been a lawyer since the age of 23. He graduated from the University of Iowa College of Law Cum Laude and was part of the law review staff. Humphreys was the first person in thirty years to attend law school and play college football. His honors include three Big Ten Championships, two Rose Bowls, three letters, and All Star recognition. He was president of all his graduating classes in college and school. He was the youngest Chairman of the State Bar Committee and editor of the Federal Practice and Procedure Handbook for the Iowa Bar. He was elected to the Iowa Academy of Trial Lawyers which selects its 225 members by membership vote. He has received many civic awards for distinguished service. He also served his country as the first defense counsel in Vietnam, having volunteered in 1965 as a regular Army officer. He has been approved by his church as a candidate for ministry and has completed several courses in seminary.

Humphreys was never disciplined by a state bar in over thirty years of practice.

In 1984, shortly after he was interviewed to run for Congress, the federal prosecutor and the I.R.S. began investigating him. In February, 1987, twelve armed agents raided Humphreys & Associates Law Firm, P.C. where Humphreys and other attorneys officed, with a search warrant. The warrant was issued by a Magistrate who was hired shortly thereafter by his former law firm. The senior partner in this firm was married to Humphreys's ex-wife. [Humphreys alleges the warrant was issued improperly and the search exceeded the scope of the warrant.]

In August 1990, within days of the statute of limitations expiring, the federal prosecutor in Iowa indicted Humphreys

compulsory discipline rules, however, do not distinguish among convicted attorneys except by the nature of their crimes. Collateral matters, such as an attorney's record of service and achievement, or bad acts and character traits not related to the record of conviction, are not at issue.[5]

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for tax evasion in 1983, 1984, and 1985. This was for less than five percent of his gross income and involved tax returns all prepared by a certified professional accountant who had also been his accountant-bookkeeper with an office within the law firm. The I.R.S. Special Agent later testified Humphreys's books of account were "surprisingly accurate."

The Department of Justice Guidelines for Prosecution required at least three consecutive years of tax deficiencies of at least $2,500.00 per year. In order to qualify, the I.R.S. moved income from 1984 to 1985, and included property pledged under security agreements as "barter income" from 1983. It also intentionally misrepresented at least one income item.

[5] *See also Supreme Court Comm. on Professional Conduct v. Jones*, 509 S.W.2d 294, 295 (Ark. 1974) ("Another premise upon which much testimony is based is that the conviction was politically motivated. For the purposes of this proceeding we must, and do, accept the jury verdict at face value."); *In re Mann*, 154 S.E.2d 860, 863 (W. Va. 1967) ("That question, we believe, must be determined from the crime itself, rather than upon the basis of facts and circumstances affecting personally the [attorney] who stands convicted."); *In re Tinkoff*, 101 F.2d 341 (7th Cir. 1938), *cert. denied*, 308 U.S. 553 (1939) ("Respondents answer . . . consisted of allegations of fact, which if true, established that his conviction in the criminal case had been obtained as a result of perjury committed with the knowledge and consent of the [prosecutor]. . . . The District Court properly refused to retry the original criminal case for the purpose of showing that the judgment of that case was wrong. . . . That judgment was an adjudication of the fact that respondent had committed the acts which in law constituted the charged felony . . . and is not subject to collateral attack in a disbarment proceeding. . . . ").

Under TEX. R. DISCIPLINARY P. 8.04 (1992), compulsory discipline for an Intentional Crime turns solely on the validity of the record of conviction, the nature of the sentence, and the factual determination that the Respondent is the same person as the party adjudicated guilty. All attorneys convicted of Intentional Crimes, as defined in TEX. R. DISCIPLINARY P. 1.06 (1992), are subject to mandatory discipline.

B

TEX. R. DISCIPLINARY P. 106(O) (1992) defines "Intentional Crime" in relevant part as "any Serious Crime that requires proof of knowledge or intent as an essential element." A conviction under 26 U.S.C. § 7201 requires the government to prove that the defendant has "willfully attempt[ed] . . . to evade or defeat a tax" beyond a reasonable doubt. "Willfulness" in this context means voluntary intentional violation of a known duty. *United States v. Daniels*, 617 F.2d 146, 148-49 (5th Cir. 1980); *United States v. King*, 616 F.2d 1034, 1039 (8th Cir.), *cert. denied*, 446 U.S. 969 (1980); *United States v. Garber*, 607 F.2d 92, 98 (5th Cir. 1979). Thus, a conviction under 26 U.S.C. § 7201 necessarily satisfies the *mens rea* requirement of the definition of Intentional Crime. However, we must still determine whether a willful attempt to evade or defeat a tax is a "Serious Crime" under the Texas Disciplinary Rules.

"Serious Crime," as defined in TEX. R. DISCIPLINARY P. 1.06(U) (1992),

> means barratry; any felony involving moral turpitude; any misdemeanor involving theft,

> embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

Willful attempt to evade or defeat a tax is a felony punishable by a fine not more than $100,000 or imprisonment not longer than five years. 26 U.S.C. § 7201.

We have held that the question of whether a particular crime involves moral turpitude is a question of law and "is to be determined by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law." *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980); *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 8.04 cmt. 4 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1994) (STATE BAR RULES art. X, § 9). Although the comments to the former AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1981), indicated that jurisdictions were split on the question of whether "offenses against the revenue laws" involve moral turpitude, *see* MODEL CODE DR 1-102(A)(2) n.13, the more recent AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 8.4 cmt. 1 (1992), specifically lists revenue offenses among those that "reflect adversely on fitness to practice law" in its discussion of moral turpitude:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.[6] However, some

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[6] This specific example of attorney misconduct involving the revenue laws is a misdemeanor, as opposed to the felony of willful attempt to evade or defeat a tax. *See* 26 U.S.C. § 7203.

> kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

Tax evasion is not a matter solely concerning "personal morality." Willful attempt to evade or defeat a tax involves intentional conduct, in violation of a known legal duty and in pursuit of personal gain, that effectively defrauds the government and other taxpayers. *Daniels; King; Garber, supra.* As such it is an offense involving deliberate greed and dishonesty and has a specific connection to a lawyer's fitness to practice.

The overwhelming majority of jurisdictions considering the issue have determined that willful attempt to evade or defeat a tax is a crime involving moral turpitude. *In re Taylor,* 851 P.2d 1138 (Or. 1993); *Committee on Legal Ethics of the State Bar v. Boettner,* 422 S.E.2d 478 (W. Va. 1992); *Attorney Grievance Comm'n v. Osburn,* 498 A.2d 276 (Md. 1985) (disbarred for state tax violations); *In re Wines,* 660 P.2d 454 (Ariz. 1983) (defendant charged with violating 26 U.S.C. § 7201 and convicted of lesser-included § 7203 offense following plea bargain suspended for misdemeanor involving "moral turpitude."); *State Bar Ass'n v. O'Halloran,* 412 So.2d 523 (La. 1982); *In re Grimes,*

326 N.W.2d 380 (Mich. 1982) (suspension raised to disbarment); *In re Reardon*, 369 A.2d 666, 667 (Del. 1976); *State Bar Ass'n, Inc. v. Agnew*, 318 A.2d 811 (Md. 1974) (Attorney disbarred despite record of service: "[W]hen a member of the bar is shown to be willfully dishonest for personal gain by means of fraud, deceit, cheating or like conduct . . . disbarment follow[s] as a matter of course."); *Dayton Bar Ass'n v. Carter*, 319 N.E.2d 358 (Ohio 1974) (per curiam); *Supreme Court Comm. on Professional Conduct v. Jones*, 509 S.W.2d 294, 295 (Ark. 1974) ("[W]e reject all contentions that one's guilt of willfully and knowingly attempting to evade or defeat payment of taxes . . . does not involve moral turpitude."); *In re Snook*, 499 P.2d 1260 (Idaho 1972); *In re Abramson*, 37 A.D.2d 301, 324 N.Y.S.2d 891 (N.Y.App.Div. 1971); *In re Bosch*, 175 N.W.2d 12 (N.D. 1970); *In re Mann*, 154 S.E.2d 860 (W. Va. 1967); *State ex. rel. Okla. Bar Ass'n v. Houts*, 420 P.2d 498 (Okla. 1966); *In re Foley*, 364 S.W.2d 1 (Mo. 1963) (en banc); *In re Alker*, 157 A.2d 749 (Pa. 1960); *State v. Brodson*, 103 N.W.2d 912, 195 (Wis. 1960); *In re Teitelbaum*, 150 N.E.2d 873 (Ill. 1958); *State ex rel. The Florida Bar v. Evans*, 94 So. 2d 730 (Fla. 1957); *In re Seijas*, 318 P.2d 961 (Wash. 1957). Three other jurisdictions have held that such a violation frequently involves moral turpitude, but does not involve moral turpitude *per se*. *In re Shorter*, 570 A.2d 760 (D.C. 1990) (disbarred); *In re Gibbs*, 271 N.E.2d 729 (Ind. 1971) (disbarred); *People ex rel. Dunbar v. Fischer*, 287 P.2d 973 (Colo. 1955) (disbarred); *In re Hallinan*, 272 P.2d 768 (Cal. 1954), *later proceeding, In re Hallinan*, 307 P.2d 1 (Cal. 1957) (per curiam). No court has held, as Mr. Humphreys asks us to do, that willful attempt to evade or defeat a tax as a matter of law does not involve moral turpitude.

The weight of reason and authority lead us to the conclusion that a violation of 26 U.S.C. § 7201 involves moral turpitude *per se*. The non-*per se* cases uniformly distinguish crimes that involve moral turpitude from those that do not on the basis of vague tests not specifically related to an attorney's fitness to continue in the practice of law. For example, Humphreys cites *In re Hallinan*, 272 P.2d 768; *In re Shorter*, 570 A.2d 760, and *In re McBride*, 602 A.2d 626 (D.C. 1992) for the proposition:

> [A] crime involves moral turpitude if "the act denounced offends the generally accepted moral code of mankind." It involves "baseness, vileness, depravity in the private and social duties which man owes to his fellow man or to society in general. . . . "

See Shorter, 570 A.2d at 765; *Hallinan*, 272 P.2d at 771. These cases also base their conclusions that tax evasion does not involve moral turpitude *per se* on the argument that "intent to defraud" is not an essential element of tax evasion.

Modern authorities defining moral turpitude have abandoned vague standards such as "the generally accepted moral code of mankind." *See, e.g.*, AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 8.04 cmt. 1. Instead, we have said that crimes involving moral turpitude are "to be [identified] by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law." *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980). Generally, moral turpitude is implicated by crimes that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or

that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* ABA MODEL RULES 8.4(b), (c). By definition, a violation of 26 U.S.C. § 7201 "involve[s] intentional dishonesty for purposes of personal gain." *See In re Hallinan*, 307 P.2d at 2. It therefore involves moral turpitude *per se*.[7] Accordingly, we hold that felony tax evasion is an Intentional Crime for disciplinary purposes.

The Board of Disciplinary Appeals determination that felony tax evasion is not an Intentional Crime is erroneous as a matter of law, and is therefore an abuse of discretion. Accordingly, we reverse the order of the Board, and hereby render judgment disbarring Lloyd Humphreys.

John Cornyn
Justice

OPINION DELIVERED: March 30, 1994

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[7] Not all crimes may be classified according to *per se* rules. If an attorney is convicted of a crime that is not *per se* a crime involving moral turpitude, then the Board of Disciplinary Appeals must determine whether the particular conviction involved an Intentional Crime. *See Turton v. State Bar of Tex.*, 775 S.W.2d 712, 715-17 (Tex. App. – San Antonio 1989, writ denied).

§ 1257. State courts; appeal; certiorari (Prior to 1988)

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, June 25, 1948, c. 646, 62 Stat. 929.

§ 1257. State courts; appeal; certiorari (After 1988)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

RULE 2.13 DISPOSITION UPON A FINDING OF JUST CAUSE

Should an investigatory panel find Just Cause, it may, with the consent of Respondent, impose any Sanction available under these rules except disbarment. It may also, with or without Sanctions, impose a referral for rehabilitation with the consent of Respondent. If a negotiated result is reached, or if the investigatory panel wishes to offer an agreed result to the Respondent, its terms shall be embodied in a written judgment which shall contain the findings, conclusions, Sanctions or referral for rehabilitation agreed upon . . . If the Chief Disciplinary Counsel has not received the judgment signed by the Respondent 20 days after the Respondent received it, the matter shall proceed as if no negotiated result had been reached. If the investigatory panel is unable to negotiate a Sanction with the Respondent, it shall so notify the Complainant and the Respondent by U.S. certified mail, return receipt requested, and the matter will proceed. Such notice must include the following statement: "Further proceedings shall be conducted before an evidentiary panel of a District Grievance Committee, in accordance with the Texas Rules of Disciplinary Procedure, unless you timely elect, in accordance with Section 2.14 thereof, to have the Complaint heard in a district court of proper venue, with or without a jury, instead of by an evidentiary panel of the District Grievance Committee" . . .

RULE 2.14 OPTIONAL TRIAL DE NOVO

If a Respondent is notified, in accordance with Section 2.13, of a finding of Just Cause and an inability to negotiate a Sanction, he or she may elect to have the Complaint heard in a district court of proper venue, with or without a jury, instead of by an evidentiary panel of the Committee. . . .

RULE 2.16 EVIDENTIARY HEARINGS

If the investigatory panel of the Committee finds Just Cause and if the Respondent fails to elect to have the Complaint tried in the district court, the matter may be transferred, if necessary, in accordance with the venue provisions of these rules. The chair of the Committee to which the matter is transferred shall appoint an evidentiary panel to conduct an evidentiary hearing, to make findings of fact and conclusions of law, and either to dismiss the Complaint or to impose Sanctions. . . .

RULE 2.21 APPEALS BY COMPLAINANT, RESPONDENT, OR CHIEF DISCIPLINARY COUNSEL

The Complainant, Respondent, or Chief Disciplinary Counsel may appeal to the Board of Disciplinary Appeals any findings, conclusions, or Sanctions imposed by an evidentiary panel. Such appeals must be on the record, determined under the standard of substantial evidence . . .

PART III. TRIAL DE NOVO IN THE DISTRICT COURT

RULE 3.01 DISCIPLINARY PETITION

If the Respondent timely files an election for trial de novo in accordance with Section 2.14, the Chief Disciplinary Counsel shall file a Disciplinary Petition in the name of the Commission . . .

RULE 3.05 DISCOVERY

Discovery is to be conducted as in civil cases generally . . .

RULE 3.06 TRIAL BY JURY

In a Disciplinary Action, either the Respondent or the Commission shall have the right to a jury trial . . .

RULE 3.09 JUDGMENT

If the trial court fails to find from the evidence in a case tried without a jury, or from the verdict in a jury

trial, that the Respondent's conduct constitutes Professional Misconduct, the court shall render judgment accordingly . . .

RULE 3.10 HEARING ON SANCTIONS; RELEVANT FACTORS

The trial court may, in its discretion, conduct a separate evidentiary hearing on the appropriate Sanction or Sanctions to be imposed. In imposing the Sanction or Sanctions, the court shall consider:

A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned.

B. The seriousness of and circumstances surrounding the Professional Misconduct.

C. The loss or damage to clients.

D. The damage to the profession.

E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found.

F. The profit to the attorney.

G. The avoidance of repetition.

H. The deterrent effect on others.

I. The maintenance of respect for the legal profession.

J. The conduct of the Respondent during the course of the Committee action.

K. The trial of the case.

L. Other relevant evidence concerning the Respondent's personal and professional background. In addition, the Respondent's disciplinary record, including any private reprimands, is admissible on the appropriate Sanction to be imposed . . .

RULE 3.16 APPEALS

A final judgment of the district court and any order revoking or refusing to revoke probation of a suspension from the practice of law may be appealed as in civil cases generally.

7.21 *Judicial Review:* An appeal from a determination of the Board of Disciplinary Appeals shall be to the Supreme Court. If such an appeal is to be taken, it must be filed with the Clerk of the Supreme Court within fourteen days after the receipt from which the appeal is taken. Except as herein expressly provided, the appeal must be made pursuant to the then applicable Texas Rules of Appellate Procedure. Oral argument may be granted on motion. The case shall be reviewed under the

substantial evidence rule. The Court may affirm a decision of the Board of Disciplinary Appeals by order without written opinion.

PART VIII. COMPULSORY DISCIPLINE

8.01 *Generally:* When an attorney licensed to practice law in Texas has been convicted of an intentional Crime or has been placed on probation for an Intentional Crime with or without an adjudication of guilt, the Chief Disciplinary Counsel shall initiate a Disciplinary Action seeking compulsory discipline pursuant to this part. Proceedings under this part are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication.

8.02 *Conclusive Evidence:* In any disciplinary Action brought under this part, the record of conviction or order of deferred adjudication is conclusive evidence of the attorney's guilt.

8.03 *Commencement of Suit:* A Disciplinary Action under this part must be indicated by the filing of a petition with the Board of Disciplinary Appeals. The petition must allege the adjudication of guilt (or probation without an adjudication of guilt) of an intentional Crime; allege that the Respondent is the same person as the party adjudicated guilty or who received probation with or without an adjudication of guilt for such intentional Crime; and seek the appropriate discipline.

8.04 *Procedure:* The Board of Disciplinary appeals shall hear and determine all questions of law and facts . . .

RULE 8.04 PROCEDURE

The Board of Disciplinary Appeals shall hear and determine all questions of law and fact . . . Upon introduction into evidence of a certified copy of the judgment of conviction or order of deferred adjudication and a certificate of the Clerk of the Supreme Court that the attorney is licensed to practice law in Texas, the Board of Disciplinary Appeals shall immediately determine whether the attorney has been convicted of an Intentional Crime or granted probation without an adjucation of guilt for an Intentional Crime. Uncontroverted affidavits that the attorney is the same person as the person convicted or granted probation without an adjudication of guilt are competent and sufficient evidence of those facts. Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law. The Board of Disciplinary Appeals shall sit, hear, and determine whether the attorney should be disciplined and enter judgment accordingly . . .

RULE 8.05 DISBARMENT

When an attorney has been convicted of an Intentional Crime, and that conviction has become final . . .

RULE 8.06 SUSPENSION

If an attorney's sentence upon conviction of a Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney's license to practice law shall be suspended during the term of probation . . . If probation is revoked, the attorney shall be disbarred . . .

PART IX. RECIPROCAL DISCIPLINE

RULE 9.01 ORDERS FROM OTHER JURISDICTIONS

Upon receipt of information indicating that an attorney licensed to practice law in Texas has been disciplined in another jurisdiction, the Chief Disciplinary Counsel shall diligently seek to obtain a certified copy of the order or judgment of discipline from the other jurisdiction, and file it with the Board of Disciplinary appeals along with a petition requesting that the attorney be disciplined in Texas. A certified copy of the order or judgment is prima facie evidence of the matters contained therein, and a final adjudication in another jurisdiction that an attorney licensed to practice law in Texas has committed Professional Misconduct is conclusive for the purposes of a Disciplinary Action in this state, subject to the defenses set forth in Section 9.04 below.

RULE 9.03 DISCIPLINE TO BE IMPOSED

If the attorney fails to file his or her answer with the Board of Disciplinary Appeals within the thirty-day period provided by Section 9.02, the Board of Disciplinary Appeals shall enter a judgment imposing discipline identical, to the extent practicable, with that imposed in the other jurisdiction . . .

RULE 9.04 DEFENSES

If the Respondent files an answer, he or she shall allege, and thereafter be required to prove by clear and convincing evidence, to the Board of Disciplinary Appeals one or more of the following defenses to avoid the imposition of discipline identical, to the extent practicable, with that directed by the judgment of the other jurisdiction:

A. The the procedure followed in the other jurisdiction on the disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

B. That there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board of Disciplinary Appeals, consistent with its duty, should not accept as final the conclusion on the evidence reached in the other jurisdiction.

C. That the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice.

D. That the misconduct established in the other jurisdiction warrants substantially different discipline in this state.

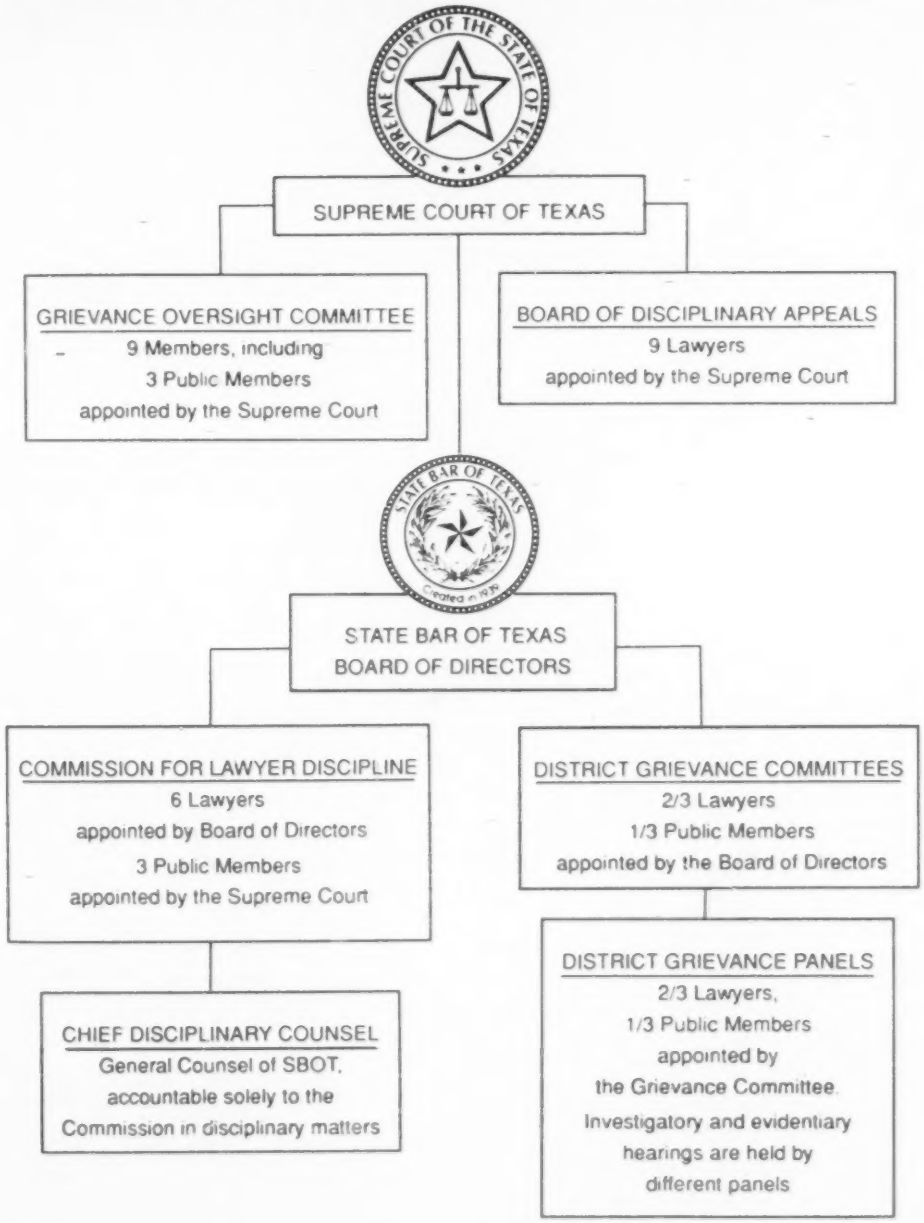
E. That the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state. If the Board of Disciplinary Appeals determines that one or more of the foregoing defenses have been established, it shall enter such orders as it deems necessary and appropriate.

PART XI. REINSTATEMENT AFTER DISBARMENT

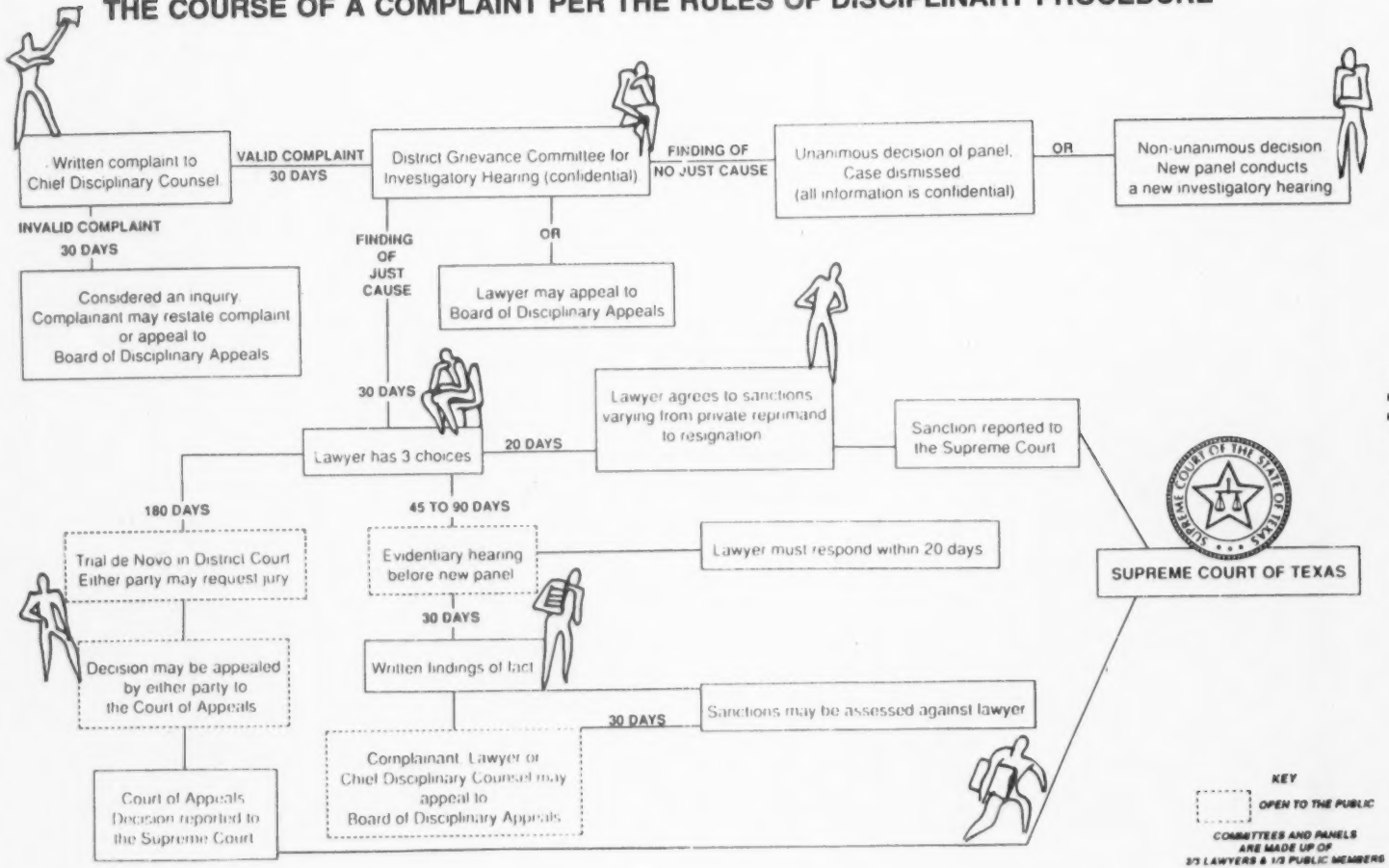
RULE 11.01 ELIGIBILITY AND VENUE

A disbarred person or a person who has resigned in lieu of Disciplinary Action may, at any time after the expiration of five years from the date of final judgment of disbarment or acceptance of resignation in lieu of Disciplinary Action, petition the district court of the county of his or her residence for reinstatement . . .

RESPONSIBILITY FOR LAWYER DISCIPLINE



THE COURSE OF A COMPLAINT PER THE RULES OF DISCIPLINARY PROCEDURE


Written complaint to Chief Disciplinary Counsel
VALID COMPLAINT
30 DAYS
District Grievance Committee for Investigatory Hearing (confidential)
FINDING OF NO JUST CAUSE
Unanimous decision of panel. Case dismissed (all information is confidential)
OR
Non-unanimous decision New panel conducts a new investigatory hearing
INVALID COMPLAINT
30 DAYS
Considered an inquiry. Complainant may restate complaint or appeal to Board of Disciplinary Appeals
FINDING OF JUST CAUSE
OR
Lawyer may appeal to Board of Disciplinary Appeals
30 DAYS
Lawyer has 3 choices
20 DAYS
Lawyer agrees to sanctions varying from private reprimand to resignation
Sanction reported to the Supreme Court
180 DAYS
Trial de Novo in District Court Either party may request jury
45 TO 90 DAYS
Evidentiary hearing before new panel
Lawyer must respond within 20 days
30 DAYS
Written findings of fact
Decision may be appealed by either party to the Court of Appeals
30 DAYS
Sanctions may be assessed against lawyer
Complainant, Lawyer or Chief Disciplinary Counsel may appeal to Board of Disciplinary Appeals
Court of Appeals Decision reported to the Supreme Court
SUPREME COURT OF TEXAS
KEY
OPEN TO THE PUBLIC
COMMITTEES AND PANELS ARE MADE UP OF 2/3 LAWYERS & 1/3 PUBLIC MEMBERS

OCT 7 1994
OFFICE OF THE CLERK

No. 94-467

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LLOYD EDWIN HUMPHREYS
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
Office of General Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
512/463-1463

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STATEMENT OF THE CASE

This is a proceeding involving the compulsory discipline of an attorney for the conviction of an Intentional Crime. On or about August 21, 1991, Lloyd E. Humphreys, was convicted by a jury of the felony offense of Income Tax Evasion, in Cause No. CR-90-0009, styled United States of America v. Lloyd E. Humphreys, in the United States District Court for the Northern District of Iowa, Cedar Rapids Division.

Specifically, the jury found Humphreys guilty of the willful attempt to evade and defeat a large part of the tax due and owing by him to the United States for calendar years 1983, 1984, 1988, and 1989.

The jury also found Humphreys guilty of the misdemeanor offense of willful filing of a false tax return. The convictions are based on a violation of *26 U.S.C. §7201*.

On November 22, 1991, the Court sentenced Humphreys to a term of incarceration in the custody of the United States Bureau of Prisons for a period of six (6) months, eighteen (18) months, and twelve (12) months to run concurrently. Humphreys was further sentenced to a three (3) year term of probation upon release from prison. The Federal Court of Appeals for the Eighth Circuit affirmed Humphreys conviction in December 1992.

The State Bar of Texas commenced disciplinary action against

Humphreys pursuant to Part VIII of the Texas Rules of Disciplinary Procedure ("Compulsory Discipline").

A hearing was held before the Board of Disciplinary Appeals ("Board") on February 27, 1993. The Board dismissed the petition filed against Humphreys on April 22, 1993. A review of the statement of facts from the hearing reveals that the Board's decision was based upon the finding that the criminal offense of Tax Evasion did not involve moral turpitude.

The State Bar of Texas appealed the dismissal directly to the Texas Supreme Court. On January 5, 1994, the Texas Supreme Court reversed the decision of the Board of Disciplinary Appeals and entered a

judgment of disbarment against Humphreys. The Texas Supreme Court held that the felony offense of Tax Evasion was per se a crime involving moral turpitude and thus Humphreys was subject to the Texas compulsory discipline statutes.

APPLICABLE STATUTES

Rule 8.01, Tex. R. Disc. P. provides for the initiation of a Disciplinary Action seeking compulsory discipline by the Chief Disciplinary Counsel when an attorney licensed to practice law in Texas has been convicted of an Intentional Crime.

"Intentional Crime" means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime

involving misapplication of money or other property held as a fiduciary. *Rule 1.06(O), Tex. R. Disc. P.*

"Serious Crime" means barratry; **any felony involving moral turpitude**; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes. *Rule 1.06(U), Tex. R. Disc. P.*

At the hearing, there was no debate that the offense is a felony or that an essential element of the crime of willful tax evasion is proof of knowledge or intent. In fact, to sustain conviction for felony of willful tax evasion, the

government must establish beyond a reasonable doubt that the defendant acted willfully and knowingly with the specific intent to evade his income tax obligation, that there was a tax deficiency, and that there was an affirmative act constituting the evasion. *United States v. Daniels, 617 F.2d 1980 (1980).*

Rather, the only genuine issue raised was whether the crime was one involving moral turpitude.

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Lloyd E. Humphreys has failed to timely file his Petition. The Texas Supreme Court issued its judgment and original opinion on January 5, 1994. (See Petitioner's

Writ of Certiorari Appendix p. 2). On March 30, 1994, The Texas Supreme Court overruled Humphreys motion for rehearing and substituted a second opinion for that issued January 5, 1994. (App. 1). The judgment, however, remained unchanged. On May 11, 1994, the Texas Supreme Court overruled Humphreys second motion for rehearing. (App. 2).

Rule 13.4 provides that the time for filing a petition for writ of certiorari runs from the date of judgment or from the date of the denial of a petition for rehearing, but not from the date of the issuance of the mandate. In the case at hand, Humphreys second motion for rehearing was overruled on May 11, 1994. Thus, his petition

was due to be filed with this Court within ninety (90) days of May 11, 1994, i.e. August 9, 1994.

The date relied upon by Humphreys, June 13, 1994, is date of the issuance of the mandate by the Texas Supreme Court. (App. 3). Thus, Humphreys' petition is untimely and should be dismissed based upon lack of jurisdiction.

Nor has Humphreys established jurisdiction of this Court in accordance with either 28 U.S.C. §1257, Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States. No federal question was decided by the state court of last resort. Nor does the case involve the validity of a State

statute in connection with the Constitution of the United States.

The primary question decided by the Texas Supreme Court was whether the felony offense of Tax Evasion is a crime involving moral turpitude. As the Court's opinion states, the overwhelming majority of jurisdictions considering the issue have determined that willful attempt to evade or defeat a tax is a crime involving moral turpitude and no court has held that this crime as a matter of law does not involve moral turpitude.

Therefore, this Court should deny Humphreys's petition for lack of jurisdiction.

ARGUMENT AND AUTHORITIES

Although couched in terms of national significance and universal application, what Humphreys truly seeks is a retrial of the criminal allegations which led to his conviction for Tax Evasion and a retrial of his disciplinary lawsuit. This is evident from his assertions that his conviction was void and his continued references to the "facts" surrounding his conviction.

In compulsory discipline proceedings, it is the judgment of conviction itself that forms the basis of the lawsuit. Furthermore, the record of the conviction is conclusive evidence of the attorney's guilt. *Rules 8.01 and 8.02, Tex. R. Disc. P.*. The

compulsory discipline scheme requires confidence and trust in the criminal justice system where a higher burden of proof is required for a conviction and stronger constitutional protections are afforded the defendant.

An inquiry into the facts is not appropriate for a determination of moral turpitude. If an inquiry into the facts is necessary to determine the issue of moral turpitude, the utility and efficiency of the compulsory discipline procedure will be eliminated. It is fruitless to pursue a compulsory discipline matter if the State Bar must introduce the facts which led to the attorney's criminal conviction.

Finally, the Texas Supreme Court has already held that the issue of whether a particular offense involves moral turpitude is strictly a question of law and is not a fact issue. *State Bar of Texas v. Heard, 603 S.W.2d 829 (Tex. 1980), supra.* It is the nature of the crime itself and how it bears upon an attorney's moral fitness to continue to practice law which governs the determination.

The major problem with delving into the facts of the underlying criminal conviction is the consequence of eroding the compulsory discipline procedures and ultimately unraveling the entire scheme. No intellectual distinction can be made for allowing a factual

inquiry into some offenses committed by lawyers but not others. If an inquiry into the facts of some crime is allowed, one could then argue that the facts are relevant in determining moral turpitude for offenses which have universally been declared to constitute moral turpitude, per se, such as theft. Thus, Humphreys argument concerning the right to a jury trial are without merit. There are no fact issues to be decided. The jury in the criminal case already determined the facts involving his conviction and a retrial of the criminal case is neither proper nor necessary in determining compulsory discipline. Thus, The Texas Supreme Court correctly held that the right to

jury trial is satisfied so long as the disbarred attorney's conviction was obtained in a court of competent jurisdiction by constitutionally adequate procedures.

Humphreys' petition essentially attacks the entire compulsory discipline procedure. Historically, in the area of discipline, lawyers who have been convicted of crimes have been viewed separately and apart from lawyers who have not been convicted of a crime but have nonetheless violated disciplinary rules of professional conduct. This is evident in light of the fact that since at least 1969, the Texas Supreme Court, in the exercise of its inherent power to regulate the practice of law, has seen fit to

provide for a separate and expedited procedure for disciplining lawyers who have been convicted of criminal acts. *See Part VIII, Texas Rules of Disciplinary Procedure (1992); Former Article X, §26, State Bar Rules (1984); Former Article 320a-1, §6, Vernon Tex. Civ. Stat. (Vernon 1969).*

As stated by the United States Supreme Court in *Ex Parte Wall, 107 U.S. 265, 274, 2 S.Ct. 569, 576, 27 L.Ed. 552 (1882)*:

> ". . . Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, . . . argues recreancy to his position and office, . . . It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and

preserve. . ."

The Texas Supreme Court in *State Bar of Texas v. Heard*, *603 S.W.2d 829, 834 (Tex. 1980)* stated:

> The practice of law is a license, not a right, and only person of **good moral character and fitness** are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands. [Emphasis Added]

Every Court's primary obligation is to maintain the standards of the legal profession so that public confidence in the profession may continue. The goal is to protect the public, the courts, and the profession against unsuitable practitioners. There are certain qualities which are highly essential

and desirable on the part of those who are to exercise the privileges and responsibilities of a member of the bar. They include honesty, integrity, fidelity to trusts, and good moral character. A lawyer's primary duty is to keep his own conduct above reproach because improper conduct by even a few attorneys lowers the prestige of the profession and its effectiveness in performing its duties and responsibilities.

Thus, the true concern for any Court is maintaining the standards of the profession and protecting the public by ensuring that members of this bar are worthy of continued admission through the possession of good moral character.

The constitutionality of the State Bar Rules has been unsuccessfully challenged throughout their enactment and implementation. The courts have recognized the State Bar Act and State Bar Rules as constitutional and valid. *State v. Dancer*, *392 S.W.2d 504, 509 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.)*. See also *Musslewhite v. State Bar of Texas*, *786 S.W.2d 437, 441 (Tex.App.--Houston [1st Dist.] 1990, writ denied)* [attorney disciplinary rule prohibiting false and misleading communications was not unconstitutionally vague]; *Bryant v. State*, *457 S.W.2d 72 (Tex.Civ.App.--Eastland 1970, writ ref'd n.r.e.)* [suspension during appeal of

criminal conviction constitutional]; *O'Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988)* [restriction on in-person solicitation constitutional].

The Texas Supreme Court did nothing more than follow the rules promulgated for disciplining lawyers who have been convicted of certain crimes and no basis exists for review by this Court of its decision.

SUMMARY AND CONCLUSION

Humphreys petition is untimely and thus he has failed to properly invoke jurisdiction of this Honorable Court. Furthermore, the constitutionality of the compulsory discipline scheme was not presented to the Texas Supreme Court nor

written on by the Court other than to the extent that the Court correctly held that the Ex Post Facto Clause of the United States Constitution prohibits laws that criminalize behavior retroactively. This holding is in accordance with decisions of this Court.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel

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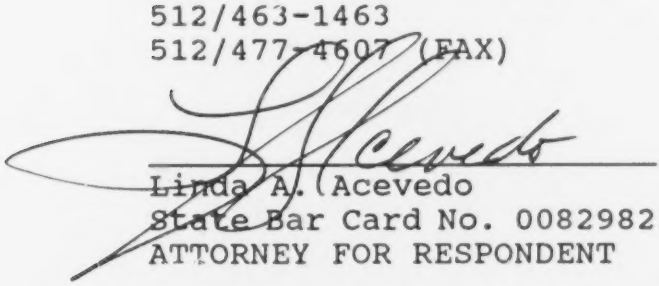
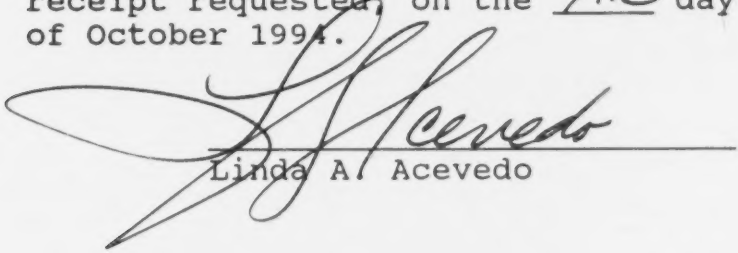
512/477-4607 (FAX)



Linda A. Acevedo
State Bar Card No. 00829825
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Lloyd E. Humphreys, Petitioner, P.O. Box 8300-257, Dallas, Texas, 75205, by delivery of a true and correct copy to him by certified mail, return receipt requested, on the 7th day of October 1994.



Linda A. Acevedo

APPENDIX

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

Today, the Supreme Court of Texas overruled the motion for rehearing in the above-referenced cause and delivered the enclosed opinion which is substituted for that of January 5, 1994, which is today withdrawn; however, the judgment remains unchanged. Justice Doggett joins in the judgment only.

Signed: March 30, 1994

Respectfully yours,

John T. Adams, Clerk

Peggy Littlefield,
Chief Deputy Clerk

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

Today, the Supreme Court of Texas overruled the second motion for rehearing, as amended, in the above-referenced cause. State Bar's motion to direct mandate to the Board of Disciplinary Appeals to enter judgment of disbarment is dismissed as moot.

Signed: May 11, 1994

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

D-3811

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF §
§
LLOYD E. HUMPHREYS §

ORDER

The judgment of the Supreme Court of Texas is now final in the above-referenced cause. As Rule 186, Tex. R. App. P., has been satisfied, we have issued the mandate as of today.

Signed: June 13, 1994

Sincerely,

John T. Adams, Clerk

by _____
Courtland Crocker,
Deputy